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SOME BASIC PRIORITY PROBLEMS IN A LAND DEVELOPMENT PROJECT IN MISSISSIPPI WITH EMPHASIS UPON POWER OF SALE FORECLOSURE PROCEDURES

Guthrie T. Abbott

1979 MISSISSIPPI SUPREME COURT REVIEW

VOLUME 50 DECEMBER 1979 NUMBER 4

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In Memoriam

Unawed by the high and mighty, unseduced by flattery, undismayed by devastating disease, Harry Case confronted life with matchless courage—and death with Christian hope. The demon cancer has claimed another of our friends, and we wonder once more why it seems the good die so young. The question remains unanswered and so it must be, but is life not measured in quality rather than quantity.

Harry Case was pure quality. He and I walked up the steps of the Law School together to our first law class in 1959. Our friendship developed quietly as we studied, played golf, worked, shared experiences and leaned on each other like friends will do through the good times and the bad. The years passed and though our paths crossed less frequently than in earlier days, he and I both knew the other was there and it was comforting to both of us.

It was quality that characterized the man. Harry was plain spoken, but not blunt; he was bright—very intelligent—but not pretentious; scholarly, but not egg-headed; he was a practical, straight, decent sort of guy. You enjoyed his company. He was never overbearing, and never out of place. He could play golf all day, cards all night, and teach the next day without missing a beat. There was a priceless depth of character in Harry Case. He had that inner strength, resourcefulness and unwavering courage possessed by those of deep and abiding faith. He was a man. He was a gentleman.

Harry was sensitively aware of others, quick to respond and respect, most unerringly appropriate. Once aware of the feeling of fear or timidity in another, he became instantly the staunch encourager and ally. Aware of worry in another, he beamed sympathy and solace and hope. Aware of financial need, he would, if necessary, lend his last dollar. He was slow to condemn—quick to praise. Aware of good fortune, he was the first to rejoice, the last celebrant to leave.

He was a warm and patient friend. He made us all feel better. He made us think that somehow we could do more, be more.

This was his gift to friends and I am glad to have been among that company.

Harry Case is gone, but a beautiful legacy of family, friends, and great memories remain to give testimony to a life well lived, a job well done, and a death bravely faced. Yes, he was my friend; he was a gentleman, he was quality. All who knew him, all who came in contact with him, all who had any dealings with Harry Case will miss him.

Editor's note: These remarks were prepared by Hon. Robert C. Travis of Jackson. Mr. Travis served on the *Mississippi Law Journal* in 1960 as an Articles Editor.

SOME BASIC PRIORITY PROBLEMS IN A LAND DEVELOPMENT PROJECT IN MISSISSIPPI WITH EMPHASIS UPON POWER OF SALE FORECLOSURE PROCEDURES

*Guthrie T. Abbott**

I. Introduction

There are several basic tensions and conflicts which are present in almost all major land development projects. The purpose of this article is to examine the positions throughout such a project of three principal characters in a typical land development scenario. The first character is the landowner who is selling the real property to be developed. Our typical sale is to be handled by a small down payment from land developer to landowner, who then deeds the land to the developer. The remainder of the sale price is secured by a purchase money deed of trust from land developer back to original landowner. The second character in our project is the construction lender. Our "typical" lender is an institutional lender that is providing the major portion of funds needed for site development and actual construction of the improvements in the project. The third character is a major construction lienor who has put materials and services into the project. Of course, in any major construction project there will be an entire class of persons that will be in the position of our third character, the construction lienor.

Our project is ill-fated, for you may assume that as construction nears completion, our developer realizes that the value of the project, even if completed and sold at fair market value, would not bring enough to pay the aggregate indebtedness to our three principal characters. After the developer is denied his last "draw" by construction lender, he disappears and is never heard from again.

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* Professor of Law, University of Mississippi. B.A., 1964, J.D., 1967, University of Mississippi, Fellow in Law and the Humanities, Harvard University, 1975. The author is pleased to acknowledge the Lamar Order of the University of Mississippi Law Alumni Chapter for funding a portion of the research for this article by a fellowship grant.

The problems and considerations in planning and carrying through to completion a major land development project are myriad. The scope of this article will be limited to an examination of the priorities among the three principal characters described above as they each attempt to satisfy the indebtedness owed them by reaching the real property that has been developed with improvements. This discussion will require a critical analysis of the current procedure used in Mississippi for the foreclosure of real property, and the author will suggest alterations of Mississippi foreclosure procedures based upon a modified version of the foreclosure provisions of the Uniform Land Transactions Act as a prescription for some of the ills that are present in the existing system.

II. ORIGINAL LANDOWNER VERSUS CONSTRUCTION LENDER—THE SUBORDINATION PROBLEM

There are several reasons why our original landowner agreed to finance personally a large portion of the purchase price of the real property to be sold to developers. First, the developer will generally offer a purchase price in excess of the current fair market value of the raw property as the quid pro quo for the vendor's providing of the personal purchase money financing.[1] Second, the vendor may receive much more favorable income tax treatment because of such a financing arrangement.[2] At the outset there would appear to be no real risk involved for the vendor since he has obtained a first lien on the land with his purchase money deed of trust. However, our typical developer will desire to obtain a construction loan from an institutional lender. Sound lending practices as well as statutory mandates[3] will compel the construction lender to require a first mortgage on the property as security for the construction loan. It is the process of subordination of the landowner's interest to that of the construction lender which is the major point of tension between these two principals.

---

[1] *See* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW 776 n.13 (1979); Comment, *Subordination of Purchase Money Security*, 52 CAL. L. REV. 157, 157 (1964).

[2] The scope of this article does not permit discussion of the tax considerations which are certainly of paramount importance to many decisions that must be made throughout a land development project. For a thorough discussion of a vendor's considerations concerning the installment methods of receiving and reporting gain under I.R.C. § 453 and the deferred payment method of receiving and reporting gain, see P. ANDERSON, TAX PLANNING OF REAL ESTATE 109-21 (1970).

It is possible, but not advisable, for the developer not to obtain an overt agreement to subordinate from the landowner. With this approach the developer is relying upon the landowner's self-interest to motivate him to subordinate to the later construction loan, for if there is no subordination there will be no construction and ultimately no funds generated with which the developer can pay the landowner.[4] The obvious hazard in such an approach is that the landowner might have reasons, such as a better sale having materialized, for wanting out of the deal with the developer. The prudent developer will ordinarily want to include some provision for such subordination as a part of the initial purchase transaction with the developer.[5] The following discussion should indicate that drafting such an agreement *that can be enforced* against a recalcitrant land seller is not as easy as one might think.

A. Guidelines for Drafting Subordination Agreements

It is important from the developer's perspective to ensure that the landowner is obligated to subordinate to a construction loan from the very outset of the project, which may well be when the developer obtains an option to purchase the site in question. At this early stage, it should be difficult to detail with much specificity the terms of the future construction loan to which the landowner will subordinate, but it seems important for the developer at least to set forth the general agreement to subordinate. Even if such an agreement were not legally enforceable for reasons discussed below, the inclusion of such language at the option stage should smooth the way for carrying this provision forward into a more definitive contract of sale and/or purchase money deed of trust.

---

[3] The practical effect of 12 U.S.C. § 371(a)(1) (1976) is to limit national banks to loans secured by first liens; federal savings and loans are required to make first mortgage loans under 12 U.S.C. § 1464(c) (1976).

[4] *See* G. Nelson & D. Whitman, Real Estate Finance and Development 614 (1976).

[5] *Id.*

At these early stages both the landowner and the developer want an enforceable agreement, but in most situations conflict is inevitable. The landowner should want to know and is clearly entitled to know with reasonable certainty his position of priority, *i.e.*, a description of the amount of indebtedness that might have to be paid to the construction lender in the event of default and foreclosure before the landowner can reach the proceeds of the sale of the real property that was probably owned in fee simple by him before the project was commenced. If the developer has a firm commitment for the construction loan there is no problem and the details of subordination can be supplied. However, in many projects, if not in most projects, the developer must negotiate the construction loan at a future date, and consequently must allow himself enough latitude with regard to the future loan to ensure that he will be able to secure adequate financing to complete construction. In recent years, the vicissitudes of the market in construction materials coupled with the recent drastic fluctuations in interest rates have exacerbated the situation for the developer. Nevertheless, an analysis of the cases construing such subordination agreements indicates that with careful planning one can draft an agreement that should give reasonable protection to the interests of both the landowner and the developer.

The majority of the reported decisions dealing with subordination clauses indicates that too often little thought is given to the drafting of such provisions. A 1961 decision from the Court of Appeals of Maryland[6] is illustrative of the type of language deemed too general to be enforceable. The Maryland court was asked to order specific performance of a contract for purchase containing the following language:

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[6] Grooms v. Williams, 227 Md. 165, 175 A.2d 575 (1961).

> The purchaser is to place a first deed of trust secured on the premises of a minimum of $21,000.00 . . . bearing interest at the rate of 6 per cent per annum, payable approximately $250.00 per month due and payable in four years. The balance of deferred purchase money is to be secured by a Second Deed of Trust on said property, to be paid in monthly installments of $397.50 or more including interest at the rate of 6% per annum, said payments to begin when the property is improved with dwelling houses, and said houses are sold. . . . 20 acres of said land are subordinated to the purchasers for immediate improvement, and such other tracts shall be subordinated to use as the occasion may arise.[7]

The contract was found to be ambiguous and ultimately unenforceable because of a lack of clarity with regard to the following particulars concerning subordination: (1) the nature of the subordination; (2) the location of the twenty acres to be subordinated; and (3) the terms of the second deed of trust.[8]

An option contract to purchase real property in Illinois has been held too indefinite to support specific performance because the option stated, *inter alia,* that "Dennis Raben agrees to carry 2nd Deed of Trust in the amount of $25,000.00 for 10 yrs., equal payments with 6% interest per annum."[9] The Appellate Court of Illinois stated:

> In our opinion the agreement does not meet the requirement that it be certain and unambiguous. Where no restriction is imposed as to the amount of a first mortgage, the identity of the makers of a junior lien and the collectibility of a deficiency judgment might become matters of prime importance. In view of the failure to provide with specificity who was to make the mortgage, the date of its execution, and the precise manner of payment, the contract is not sufficiently definite and certain in its terms to entitle plaintiffs to specific performance.[10]

California has more reported decisions concerning subordination than any other state. An analysis of the California cases gives some excellent guidelines for drafting an agreement that should be definite enough to give protection to the land seller and support specific performance by the developer-buyer while still allowing the developer the needed leeway in negotiating the future construction loan. The California guidelines can be traced from early cases such as the 1954 decision of *Gould v. Callan*,[11] holding some very general subordination language[12] to be too uncertain and indefinite, to a line of cases such as *Stockwell v. Lindeman*,[13] commencing in the mid-1960's, which set forth with some detail how one should deal with the conflicting interests of these two principal parties to most land development projects.

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[7] 175 A.2d at 576.

[8] *Id.*

[9] Hux v. Raben, 74 Ill. App. 2d 214, 219 N.E.2d 770, 771 (1966), *aff'd,* 38 Ill. 2d 223, 230 N.E.2d 831 (1967).

[10] 219 N.E.2d at 774.

The *Stockwell* court was asked to order specific performance of a land sale contract containing essentially the provision set forth below:

> Each of the trust deeds is to bear a *subordination clause* stating that the seller agrees . . . at a future date to subordinate this deed of trust to a new construction loan deed of trust not to exceed the sum of $80,000.00 with interest not to exceed 7.5% per annum, payable *at such terms and upon such conditions as are required by the lender making such construction loan.*[14]

In holding the contract to be valid, the California court pointed to the areas of vital concern. The most crucial areas are the maximum amounts of construction loans to which the land seller can be forced to subordinate his liens and the maximum rate of interest that the developer-buyer can agree to be charged on such loans.[15] The language quoted above shows that the seller in *Stockwell* was protected in both of these regards. Developers in today's volatile markets for materials and labor as well as money must be very careful to negotiate in the subordination agreement a ceiling on the principal amount of the construction loan high enough to cover unexpected price increases between the time of land acquisition and the time of negotiation of the construction loan. The recent dramatic ups and downs in market interest rates[16] make it imperative for the developer also to try to negotiate in the subordination agreement a floating interest ceiling for the construction loan which is tied to an indicator such as the federal reserve discount rate.[17] A developer restricted to a fixed maximum interest rate over the past year or so stood an excellent chance of being boxed into a situation where the interest ceiling set in the subordination agreement was well below prevailing market rates when the construction money was needed. This potentially fatal situation could be avoided by using a floating maximum as described above.

---

[11] 127 Cal. App. 2d 1, 273 P.2d 93 (1954).

[12] The contract in *Gould* contained a provision wherein the beneficiary agreed to subordinate the purchase money trust deed to the lien of a first trust deed not to exceed 60% of true building cost of a building that might be constructed at the election of the plaintiff. 273 P.2d at 94.

[13] 229 Cal. App. 2d 750, 40 Cal. Rptr. 555 (1964).

[14] 40 Cal. Rptr. at 557-58 (emphasis added).

[15] *Id.* at 558.

Most developers intend to obtain their construction money from an institutional lender. When this is the case, the subordination agreement should require in explicit language that the construction loan be made by such a lender, for the courts have given much credence to the protection that is built into such an agreement for the land seller because of the regulations imposed upon such institutions.

Burrow v. Timmson,[18] a 1963 California case, ruled upon a subordination clause which stated "that said [future construction] loan shall be made by a bank, life insurance company, or correspondent thereof, building or saving and loan association, or other institutional lender."[19] The court discussed the effect of such language as follows:

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[16] Note, *Home Mortgage Lending Under Iowa's Revised Usury Laws During a Tight Money Market,* 65 Iowa L. Rev. 363, 363 n.2 (1980).

[17] The 1980 amendment to the Mississippi usury statute has created a floating interest ceiling tied to the federal reserve discount rate. One drafting a subordination agreement might use the legislative language as a model for the creation of such a floating maximum. The pertinent language in the statute is as follows:

> [A]ny borrower or debtor may contract to pay . . . a finance charge . . . which may result in a yield not to exceed five percent (5%) per annum above the discount rate, excluding any surcharge thereon, on ninety day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district where the lender is located calculated according to the actuarial methods.

Miss. Code Ann. § 75-17-1 (Supp. 1980).

[18] 223 Cal. App. 2d 283, 35 Cal. Rptr. 668 (1963).

[19] 35 Cal. Rptr. at 670 n.1.

> The import of these provisions is that the terms and conditions of the construction loan would have to conform to the practices of responsible and conservative lending institutions. These terms . . . would be appropriate to assure that the land, and the improvements to be constructed, would be of a value substantially greater than the amount of money loaned.[20]

Stockwell imparts additional sound drafting advice drawn from basic contract law. One must be careful to specify that participation in any future negotiations as to the details of the construction loan be limited to that of the *buyer* and the yet unnamed *construction lender.* To leave the forging of such details in the future to the *buyer* and *seller* creates a risk that the entire contract will be held uncertain and unenforceable.[21]

Mississippi has no reported decisions dealing with the enforceability, *vel non,* of such subordination agreements, but a recent decision from the United States District Court for the Northern District of Mississippi did set forth the pertinent portions of such a clause from a million dollar shopping center project.[22] The reader is asked to keep in mind the guidelines set forth above as he reads the following language from the subordination agreement in the Northern District case:

> It was further provided that upon the request of [developer], [land seller] would execute the necessary instrument or instruments subordinating its lien . . . to the lien of the security instrument to be executed by [developer] for temporary construction money to construct improvements on the above described proprty and also the lien of the security instrument to be executed by [developer] for permanent financing of the entire project when construction is completed.[23]

The subordination provision described above was not at issue in the case, but one can see at a casual glance that the clause appears to suffer from virtually all of the infirmities that have been discussed in this section and, assuming that the opinion of the court set forth all of the essentials from the agreement, the enforceability of a clause drafted with such amorphous provisions is highly questionable.

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[20] *Id.* at 672.

[21] 40 Cal. Rptr. at 560.

[22] Grenada Ready-Mix Concrete, Inc. v. Watkins, 453 F. Supp. 1298, 1301 (N.D. Miss. 1978).

[23] *Id.* at 1301.

The obvious way for the developer to assure enforceability of such an agreement is to include all details of the future construction and/or permanent loan in the subordination agreement, but, of course, such details are usually not available. However, an agreement that is drafted to include the basic elements discussed above should be both enforceable and reasonably flexible. To recapitulate, the agreement must be drafted so as to limit to a precise figure the maximum amount of construction loans to which the landowner must subordinate, to fix a ceiling (preferably of a floating nature) on the interest that can be paid for the construction loan, to limit the future construction lender to a category of institutional lenders, and to make certain that all items to be negotiated in the future be left to negotiations between the *developer* and the *construction lender* (not the land seller).[24]

B. The Effect of Construction Loan Funds Not Going Into the Project

We may now assume that the landowner has subordinated to the construction lender, and the project has gone forward. A new tension now develops between the landowner and the construction lender with regard to ensuring that the developer is putting the funds from the construction loan into the project. Obviously, both the landowner and the construction lender have great interest in seeing that these funds go into the project in order to enhance the value of their mutual security. However, it must be noted that the greater the amount of the purchase money lien of the landowner which has been subordinated, the greater the "cushion" for the lien of the construction lender. Correspondingly, the more "cushion" that the construction lender has, the less reason there is for such lender to be concerned over the developer's application of loan proceeds. These factors should be kept in mind during the following discussion of the allocation of the duties to guarantee such proper application of construction loan funds as between the landowner and the construction lender.

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[24] The text accompanying this footnote has discussed what are perceived by the author to be the essential ingredients of an enforceable subordination clause. For a more comprehensive list of possible limitations on subordination to development financing designed to define and minimize the seller's risk, see 4 P. ROHAN, REAL ESTATE FINANCING-FORMS § 3A.01(i) (1979). For a form subordination agreement that encompasses the essential items discussed above, see *id.* § 3A.06 Form 5. For a more lengthy discussion of the requisite specificity required by provisions for subordination by vendor or landlord to permit another party to obtain financing, see Annot., 26 A.L.R.3d 855 (1969).

The Mississippi Supreme Court has not spoken directly to the "funds into the project" tension discussed above, but *Grenada Ready-Mix Concrete, Inc. v. Watkins,*[25] a 1978 diversity suit in the United States District Court for the Northern District of Mississippi, dealt with this very point. The court in *Watkins* stated that it was adopting the position that it thought would be taken by the Mississippi Supreme Court.[26] The district court then issued some stern warnings for attorneys representing landowners in Mississippi developments, using the following language to predict that Mississippi would join the majority of the states in deciding this question:

> The general rule throughout the United States is that where a landowner agrees to subordinate his fee interest to a mortgage lien for the purposes of obtaining a construction loan, without an express covenant from the mortgagee (or lessee-developer) to the landowner, to see to the application of the sums advanced, possible diversion of funds by the mortgagor-developer *is a risk assumed by the landowner,* unless the latter is able to demonstrate fraud or collusion between the mortgagor-developer and the mortgagee. . . . The obvious rationale for this rule is that when parties see fit to enter into contractual arrangements, their rights and obligations are to be measured by the terms thereof, without help or assistance from courts in adding to the agreement clauses which it would have been wise or useful to have employed in the first instance.[27]

The minority view on this point would imply an agreement whereby the construction lender has the duty to supervise the distribution of loan funds. The breach of such duty would restore the priority of the landowner as to the funds improperly distributed. The leading authority for the minority position is the California case of *Middlebrook-Anderson Co. v. Southwest Savings & Loan Association.*[28] The *Middlebrook* case supported the implication of the construction lender's duty to supervise distribution with the following rationale:

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[25] 453 F. Supp. 1298 (N.D. Miss. 1978).

[26] *Id.* at 1314.

[27] *Id.* at 1313 (emphasis added).

> [A]s between the seller and the lender, the lender is by far in the better position to control the use of the loan proceeds and thereby prevent misappropriations by the developer. The lender can require documented evidence that expenses have been incurred and can corroborate this by on-site inspections. It is common for lenders to control disbursements, since they, too, have an interest in preventing misuse of loan proceeds. . . .
>
> An implied agreement in the instant case can and, in equity, should be spelled out from lender's alleged actual knowledge of the provisions of the seller's lien in general, and of the subordination therein in particular. In the superior position of a financial institution constantly engaged in professional construction lending, Southwestern had no reason to believe their trust deed conferred any lien to which the fee was subordinate other than to the extent of money spent for construction purposes. Its loan under the circumstances cannot be viewed other than as subject to the fair application of the construction funds. Accordingly, we conclude that such lien as the trust deed might have conferred on the lender should not be advanced or preferred over the seller.[29]

The *Watkins* decision quoted most of the foregoing language from *Middlebrook* and then distinguished the California case on several grounds while concluding that:

> In our opinion, the Mississippi Supreme Court, if faced with the question before us, would adopt the majority rule . . . to the effect that, absent express clauses in the loan documents directing or restricting the use of construction funds to a particular project, the subordinating landowner bears the risk of

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[28] 18 Cal. App. 3d 1023, 96 Cal. Rptr. 338 (1971).

[29] *Id.* at 1036-37, 96 Cal. Rptr. at 346-47.

> diversion by a developer who obtains a mortgage to finance improvements. . . .[30]

The warning from *Watkins* to drafters of such agreements for landowners is found in the court's rationale for refusing to find that there existed between the parties "an implied contractual duty on the part of [construction lender] to [landowner] for the successful fruition of the project; . . ."[31] The *Watkins* opinion said:

> As for any duty based upon contract, it should be pointed out initially that neither the ground lease nor the deed of trust which [landowner] signed contained any protective clauses to insure that the loan proceeds would be used for the construction of the shopping center, nor did they contain any safeguards or restrictions on the manner of distribution or expenditure of the advances. Indeed, the documents which [landowner] signed, after consulting with its own attorney, neither specified the size of the shopping center, nor the nature or quality of the buildings to be contained therein. Furthermore, these documents did not require that the shopping center structures be designed by an architect whose plans and specifications would form the basis for [lender's] advances and which would be subject to [landowner's] approval.[32]

This author is persuaded by the reasoning of the *Middlebrook* decision and would like to see an implied duty, as discussed above, imposed upon construction lenders in every instance wherein an express contractual agreement does not negate such a duty. Nevertheless, the *Watkins* decision makes very clear that in drafting the subordination documents for the landowner, one must either retain for the landowner control and supervision as to design, material quality, etc. or include protective clauses to ensure that the loan proceeds will be used for the development with which one is concerned. It is obvious that the latter approach will be more desirable for our "typical" landowner since he lacks the expertise and experience to control and supervise such a project.

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[30] 453 F. Supp. at 1314. *But see* Guaranty Mortgage Co. v. Seitz, 357 So. 2d 438, 445 (Miss. 1979), wherein landowner's lien was given preference over funds of construction lender that did not go into the project; however, the lender made no objection to the ruling of the lower court on this point, so the Mississippi Supreme Court affirmed as to that point without discussion.

[31] 453 F. Supp. at 1312.

[32] *Id.*

The author's favoring of the *Middlebrook* implied duty approach is based greatly upon the practical problem for the landowner which was outlined at the first of this section. The greater the percentage of the value of the land which the landowner agrees to subordinate, the less interest the lender will have in assuring that the developer puts the funds into the project. This fact of life should also serve, however, to spur the attorney for the landowner into making certain that his client's rights in such a situation vis-à-vis the rights of the construction lender are never left to "implication."

III. Analysis and Recommendations Concerning Procedures For Power of Sale Foreclosure in Mississippi

A. *Introduction*

The procedure used in Mississippi for foreclosure upon real property is the power of sale foreclosure. Mississippi was one of the early states to sanction this type of foreclosure,[33] which has now become the dominant mode of dispossession in a majority of the states in the United States.[34] The growth in popularity of these types of nonjudicial procedures, however, has not been without scrutiny with regard to due process. The United States Supreme Court has rendered several decisions[35] over the past decade that place strictures upon power of sale foreclosure procedures. Even though a recent article in the *Mississippi Law*

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[33] *See* Sims v. Hundly, 3 Miss. (2 How.) 896, 898-99 (1838) (Mississippi sanctioning power of sale foreclosure).

[34] Comment, *Due Process Problems of Mississippi Power of Sale Foreclosure,* 47 Miss. L.J. 67, 69 (1976).

[35] *See* North Ga. Finishing v. Di-Chem, 419 U.S. 601 (1975) (Georgia garnishment procedure held to violate due process); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (Louisiana's procedure for issuance of writ of sequestration without notice and hearing did not violate due process); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin laws of Florida and Pennsylvania that provided for pre-hearing seizure held to violate due process); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (Wisconsin prejudgment garnishment procedure held to violate due process).

Journal concluded that the Mississippi power of sale foreclosure procedures would probably meet current due process standards,[36] the same article was severely critical of the notice provisions of the Mississippi procedure.[37] This criticism of the notice provisions, or lack thereof, of the Mississippi procedure was echoed in a 1977 decision of the United States District Court for the Northern District of Mississippi.[38]

Consequently, even though the Mississippi power of sale procedures would seem to be able to withstand constitutional scrutiny there is much room for improvement. The purpose of section III of this article is to examine some of the major problem areas in Mississippi's existing power of sale foreclosure procedures. Recommendations for change to rectify these problems will then be made with such proposals being based upon modified provisions of the proposed Uniform Land Transactions Act. Special emphasis will be given in the discussion of existing problems to a recent decision of the Mississippi Supreme Court which has obfuscated the effect of a power of sale foreclosure of a first deed of trust on later construction lienors who have filed suit to enforce their construction liens.[39]

B. Existing Problems in the Mississippi Power of Sale Foreclosure Procedure

1. Mode of Notice of Foreclosure to Debtors

The landmark United States Supreme Court case of *Mullane v. Central Hanover Bank and Trust Co.*[40] established the basic tenet that, to be adequate, notice must be reasonably calculated to reach the interested parties.[41] The Mississippi statute setting forth procedural requirements for power of sale foreclosures[42] mandates only that:

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[36] Comment, *supra* note 34, at 88. This student comment has an excellent discussion of the history and development of power of sale foreclosures in both the nation and in Mississippi.

[37] *Id.* at 89.

[38] *See* United States v. White, 429 F. Supp. 1245, 1251 (N.D. Miss. 1977) (purchasers had not intelligently and voluntarily waived their due process rights to notice and hearing prior to deprivation of equity interest and right to use home financed through FHA loan).

[39] Guaranty Mortgage Co. v. Seitz, 367 So. 2d 438 (Miss. 1979).

[40] 339 U.S. 306 (1950).

[41] *Id.* at 315.

> Sale of said lands shall be advertised for three consecutive weeks preceding such sale, in a newspaper published in the county, or, if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time, and such notice and advertisement shall disclose the name of the original mortgagor or mortgagors in said deed of trust or other contract. . . .[43]

It should first be noted that the only persons required to be named in the published notice are the original mortgagor or mortgagors; thus, assuming grantees, who are the principal obligors with regard to the indebtedness, are not even required by the statute to be named in the publication.[44]

Second, it must be noted that there is no requirement that personal notice be given to any of the debtors.[45] Third, there is no regulation with regard to the location within the newspaper of the advertisement, and until 1976[46] there were no effective regulations as to newspapers which would qualify to publish legal notices.

The observations set forth above concerning the Mississippi notice provisions make it clear that with a few modifications the debtors could be accorded fairer treatment that would be more likely to ensure that they receive actual notice of the sale.

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[42] Miss. Code Ann. § 89-1-55 (1972).

[43] *Id.*

[44] Miss. Code Ann. § 2167 (1930), the predecessor of § 89-1-55, stated that such advertisement shall disclose the name of the "mortgagor or mortgagors" whose property is advertised for sale. Wilkinson v. Federal Land Bank, 168 Miss. 645, 161 So. 761, 763 (1934), decided in January of 1934 that the statute compelled disclosure of the name of the original mortgagor and all assuming grantees. The legislature responded that same year, amending the statute into the current version by adding the word "original" before "mortgagor or mortgagors." The legislative amendment clearly shows an intention to restrict disclosure in such advertisements to the naming of the original mortgagor(s) only. *But see* Morgan v. Linham, 227 Miss. 584, 590, 86 So. 2d 473, 475 (1956) (dictum) (the court, without discussing the 1934 amendment, stated that such assuming grantee is entitled to notice of the sale).

[45] Harris v. Bailey Ave. Park, Inc., 202 Miss. 776, 790, 32 So. 2d 689, 693 (Miss. 1947); Comment, *supra* note 34, at 71-72.

[46] Miss. Code Ann. § 13-3-31 (Supp. 1980) was amended effective July 1, 1976, to require that legal publications be made only in newspapers with a general circulation to paying subscribers.

2. Notice to Junior Lienors

Section 89-1-55 requires no notice of any sort to junior lienors, and an early Mississippi case[47] dealing with such a sale by the trustee stated: "The debt secured was unquestionably due. The method for giving notice was expressly provided, *and no creditor or other person interested was entitled to any other notice.*"[48]

Since the junior lienor may have more to lose than anyone as his lien is wiped out upon foreclosure of the senior lien,[49] this omission of notice to such a class of interested persons is not only unfair to the junior lienor, but as will be discussed below, it can operate to depress the sale price of the property to be sold, which may operate to the prejudice of all concerned.

3. Distribution of Proceeds of Sale Realized at Power of Sale Foreclosure

There is no guidance given by statute or by case law in Mississippi as to how the trustee should deal with the application of the proceeds of a sale when there is a surplus. Most form deeds of trust provide that such surplus shall be paid to the grantor; but the only prudent procedure for a trustee faced with several junior lienors and the grantor, each demanding payment of such funds, would be to file an original bill of interpleader[50] in chancery court as a disinterested stakeholder.

4. The Sales Price

It has been the experience of this author that most power of sale foreclosures in Mississippi produce little, if any, bidding at the sale. The vast majority of such sales results in the beneficiary under the deed of trust being the only bidder, and the successful bid by the beneficiary is usually for the amount of the indebtedness or less. It is almost impossible to succeed in having such a sale set aside on the basis of an inadequate sale price because the test is that the inadequacy from such a forced sale must be so gross as to shock the conscience of the court or to amount to fraud.[51] This stringent standard should require that every possible safeguard be built into the power of sale foreclosure procedure to ensure as high a sales price as possible, but this is certainly not the case in Mississippi. The notice requirements, as discussed above, do the very minimum to notify the debtor(s), much less to notify prospective bidders. One of the classic modes by which a junior lienor may protect his interest is to bid at the foreclosure sale so as either to obtain the property or to guarantee a sale at close to market price. However, in Mississippi, the junior lienor will often only obtain knowledge of the sale after it has concluded.[52] The advertisements required by statute[53] are buried in the legal notices section of the newspaper, and with the exception of the beneficiary's bid up to the amount of the indebtedness, the sale must be made for cash[54] to be paid in full at the time of the sale. The cumulative effect of the deficient sales procedures described above is to ensure a severely depressed sales price at most Mississippi power of sale foreclosures.

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[47] Tishomingo Sav. Inst. v. Duke, 1 So. 165 (Miss. 1887).

[48] *Id.* at 167-68 (emphasis added).

[49] *See, e.g.,* Jaubert Bros., Inc. v. Walker, 203 Miss. 242, 33 So. 2d 827 (1948).

[50] *See* V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE §§ 420-26 (2d ed. 1950).

5. *Guaranty Mortgage Co. v. Seitz*—The First Mortgagee Versus the Construction Lienor[55]

The 1979 Mississippi Supreme Court decision of *Guaranty Mortgage Co. v. Seitz*[56] has exploded upon the construction lending scene in Mississippi like a bomb. The importance of the decision rests not in the language of the opinion but rather in the result reached by the court.

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[51] Smith v. General Invs., Inc., 246 Miss. 765, 769, 150 So. 2d 862, 864 (1963).

[52] *E.g.*, Tishomingo Sav. Inst. v. Duke, 1 So. 165, 167-68 (Miss. 1887).

[53] Miss. Code Ann. § 89-1-55 (1972).

[54] *Id.* § 89-1-57.

[55] The author gratefully acknowledges that a portion of the research for the section of the article was done by David Fawcett and Will Yandell, both of whom prepared research papers in this area for credit in the Land Finance course in the Summer 1980 semester at the University of Mississippi Law Center.

[56] 367 So. 2d 438 (Miss. 1979).

The pertinent facts in the *Seitz* case are relatively simple and set forth essentially the traditional scenario for a "project gone bad" as described in the introductory section of this article. In *Seitz* the construction lender, Guaranty Mortgage, held a recorded first deed of trust to secure a construction loan for a shopping center in Oktibbeha County, Mississippi. The chancellor found, and all parties agreed for purposes of appeal, that only $583,795.48 of the Guaranty Mortgage loan went into the project. Guaranty Mortgage proceeded under the provisions of its deed of trust to advertise and then conduct a power of sale foreclosure which resulted in the property being purchased by Guaranty Mortgage for its successful bid of $700,000. Construction liens totaling $339,573.46 had been filed against the project and a suit had been filed by the landowners seeking to impose a lien upon the property in their favor.[57] The chronology of events shows that the Guaranty Mortgage power of sale foreclosure was properly advertised and then held on September 25, 1975, with Guaranty Mortgage being the purchaser. The construction lienors who had previously filed their claims in the chancery clerk's office filed a petition in the circuit court to enforce their liens *one day before* the foreclosure sale and filed notice of the suit in the lis pendens record.[58] The landowner's suit to impose a lien against the property was filed *two days before* the foreclosure sale.[59] In spite of the fact that there was never an action brought to enjoin the foreclosure, the supreme court in *Seitz* refused to treat the foreclosure sale as being final and gave the construction lender the option of paying off the liens of the materialmen and landowners or having the property sold at a judicial sale.[60] It is submitted that this decision could bring disastrous consequences for the construction industry in Mississippi, for the court did not adequately explain why the power of sale foreclosure conducted on September 25, 1975, was not final. The first mortgage construction lender contended that once the foreclosure sale was concluded the materialmen and landowners were limited to claims against the surplus proceeds arising from the foreclosure sale—the difference between Guaranty's successful bid of $700,000 and its lien of $583,795.48 for funds that were found to have gone into the project.[61]

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[57] *Id.* at 439.

[58] *Id.* at 442.

[59] *Id.* at 441.

[60] *Id.* at 444-45.

In a nutshell, the construction lender in *Seitz* was contending that the power of sale foreclosure was validly conducted and cut off all junior liens, and that after the sale all rights that the junior lienors had against the property should have been transferred to the surplus proceeds, if any, resulting from the sale. There are a number of legal theories[62] upon which the court in *Seitz* could have based a finding that the power of sale foreclosure with resultant purchase by the beneficiary was either void or voidable. However, the opinion established neither facts nor legal theory to justify the result reached. The *ratio decidendi* of the *Seitz* court was that the materialmen and landowners were protected from the power of sale foreclosure by virtue of having filed suit and having notice of the suit placed on the lis pendens record;[63] however, it is respectfully submitted that the following analysis will show that the *Seitz* result is not supported by the authorities relied upon by the court or by analogous cases from other jurisdictions. The resulting confusion as to the state of the law in this area will likely create reluctance among large construction lenders toward the financing of Mississippi projects.

The authority cited by the court in *Seitz* does not appear to lay a foundation for the result reached. The court first relied upon two very early Mississippi decisions[64] dealing with security interests in personal property to support the proposition that the purchaser at a trustee's sale takes *pendente lite* where suit to enforce materialmen's liens on the property was commenced before the sale. One of the two early cases relied upon dealt with an election of remedies problem[65] that had no bearing on the point under discussion. The other case merely established the priority of a purchase money lien on machinery over the claim of the purchaser under a deed of trust which was applied to the machinery in question only by virtue of its after-acquired property clause.[66] Neither case is helpful in dealing with the priority problem at hand.

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[61] *Id.* at 439.

[62] *See generally* G. Osborne, G. Nelson & D. Whitman, *supra* note 1, at §§ 7.20, .21.

[63] 367 So. 2d at 442-43.

[64] Smith & Vaile Co. v. Burns, 72 Miss. 966, 18 So. 483 (1895); Smith & Vaile Co. v. Butts, 72 Miss. 269, 16 So. 242 (1894).

[65] Smith & Vaile Co. v. Butts, 72 Miss. 269, 270, 16 So. 242, 243 (1894) (the mere

The court next cited *Southern Life Insurance Co. v. Pollard Appliance Co.,*[67] a 1963 Mississippi decision, as support for the following statement in *Seitz:*

> If a mortgagee who advances money on a construction project could foreclose his deed of trust after laborers' and materialmen's liens are duly filed, and after suit is filed to enforce the liens, without the title conveyed at the sale being contingent upon the validity of the liens claimed, the rights of laborers and materialmen to their liens would be thereby destroyed.[68]

If future decisions of the court give full effect to the quoted language, the court will have greatly extended the role of the construction lien in Mississippi. However, such extension will not be cost free, for the obvious effect will be to chill or deter any bidding at the foreclosure sale. Such a result can hurt everyone with an interest in the project. Also, the situation of the materialmen is not as serious as described by the court, for the rights of the construction lienors are not necessarily destroyed. Laborers and materialmen have the right to reach any surplus funds from the foreclosure sale, and the construction lender in Mississippi is only given a priority over mechanics' and materialmen's liens to the extent that the funds disbursed actually go into the project or to the extent that the construction lender uses reasonable diligence in disbursing the construction loan.[69] The *Pollard* case may be distinguished from the *Seitz* situation because the construction lender in *Pollard* did *not* use reasona-

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taking of other security does not raise presumption of waiver of statutory lien).

[66] Smith & Vaile Co. v. Burns, 72 Miss. 966, 18 So. 483 (1895).

[67] 247 Miss. 211, 150 So. 2d 416 (1963).

[68] 367 So. 2d at 442.

[69] *See, e.g.,* Wortman & Mann, Inc. v. Frierson Bldg. & Supply Co., 184 So. 2d 857 (Miss. 1966); *see* note 82 and accompanying text *infra.* For a thorough discussion of construction liens in Mississippi, see Comment, *Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals,* 47 MISS. L.J. 437 (1976).

ble diligence to ensure that the advanced funds were used to pay materialmen and laborers.[70] Consequently, the *Pollard* court simply refused to give bona fide encumbrancer protection to a lender that had violated its responsibilities as to disbursement of funds.[71] The holding in *Pollard* does not seem to apply to the *Seitz* facts because in the *Seitz* appeal the construction lender accepted the finding of the lower court as to the amount of funds that went into the project.[72]

The *Seitz* court cited no authority which would authorize the setting aside of the power of sale foreclosure merely because a junior lienor has filed suit and had notice of suit placed in lis pendens. There are only a few cases in the United States which deal directly with the effect of foreclosure upon a pending suit by a junior lienor, and all of these authorities uphold the validity of the foreclosure sale. The early California case of *Metropolis Trust and Savings Bank v. Barnet*[73] held that the purchaser from a trustee in a deed of trust superior to mechanics' liens acquired an absolute title to the real property even though the mechanics-lienors had suits pending to foreclose their liens at the time of the power of sale foreclosure.[74] *Tolleson v. Nobles,*[75] a 1913 Texas opinion, upheld the validity of a power of sale foreclosure held by the trustee for a senior lienor during the pendency of a judicial foreclosure action by a junior lienor.[76] *United States v. Boyd*[77] is a Fifth Circuit Court of Appeals opinion based upon a power of sale foreclosure in Mississippi. The United States government brought suit in federal district court to foreclose federal tax liens that were junior to a first deed of trust in favor of Prudential Life Insurance Company. Prudential was made a party to the tax lien foreclosure and answered advising that the first deed of trust was in the process of being foreclosed under the authority of the power of sale provision contained therein.[78] In holding that the first lienor, Prudential, had every right to proceed with its power of sale foreclosure in spite of the pending suit brought by the junior lienor, the Fifth Circuit stated:

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[70] 247 Miss. at 217, 224-25, 150 So. 2d at 418, 422.

[71] *Id.* at 224-25, 150 So. 2d at 422.

[72] 367 So. 2d at 439. "At the trial, Guaranty Mortgage contended that it had expended $1,123,434.48 and its deeds of trust secured this entire amount; however, the chancellor found that only $583,795.48 of this amount actually went into the construction of the shopping center, and Guaranty Mortgage does not appeal from this finding." *Id.*

[73] 165 Cal. 449, 132 P. 833 (1913).

[74] 132 P. at 835-36.

[75] 152 S.W. 850 (Tex. Civ. App. 1913).

[76] *Id.* at 851.

[77] 246 F.2d 477 (5th Cir. 1957).

> Under Mississippi law, mortgages may be foreclosed by equity foreclosure decree and sale which cuts off the equity of redemption . . ., or by a non-judicial sale under a power. If the statutory requirements are observed the sale under power is a perfect foreclosure and likewise cuts off the equity of redemption. . . . But it is inaccurate to describe these as a private sale, a private foreclosure, or a private sale under power for, the statute requires that the sale be advertised for three consecutive weeks in a newspaper published in the county where the land lies, and that a notice be posted at the courthouse door.
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> . . . .
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> *The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or Federal tax lien.*[79]

The language quoted above from *Boyd* seems to be an accurate statement of the law in all jurisdictions where such priority problems have been raised, and there are some compelling practical reasons for continuing to recognize the finality of such a power of sale foreclosure in Mississippi.

The power of sale foreclosure has become increasingly popular in the United States because in most states where authorized it is less expensive than judicial foreclosure.[80] In most instances the savings in time and expense inure to the benefit of all parties concerned, but it is feared that the practical effects of the ruling in *Seitz* will be to force judicial proceedings for most construction loan foreclosures in Mississippi. Such a radical change in Mississippi foreclosure proceedings would make it very difficult to bring construction money into the state, and the very spectre of such delays and expense in foreclosure may bring the same result.

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[78] *Id.* at 478-79.

[79] *Id.* at 482-83 (emphasis added) (citing Hubbard v. Massey, 192 Miss. 95, 4 So. 2d 230 (1941); Dibrell v. Carlisle, 48 Miss. (6 Morris) 691 (1873); Sims v. Hundly, 3 Miss. (2 How.) 896 (1838)).

[80] Pedowitz, *Current Developments in Summary Foreclosure,* 9 REAL PROPERTY PROBATE & TRUST JOURNAL 421, 421 (1974) gives a brief history of the development of foreclosure under a deed of trust by power of sale as follows:

The *Seitz* opinion creates serious problems for the simple reason that the decision leads one to believe that the foreclosure of a first deed of trust by power of sale will *not* cut off a junior lienor that has brought suit and filed notice of the suit in lis pendens. If such is in fact the current state of affairs in Mississippi, then construction lenders have been placed in an intolerable situation. The construction lender can start a power of sale foreclosure but would be at the mercy of any construction lienor who wanted to wait until the day before the scheduled sale (as actually happened in *Seitz*) to file suit and lis pendens. Since, according to *Seitz,* a purchaser at the foreclosure sale would take title subject to the outcome of the pending claim of the junior lienor, the obvious result of this rule will be that there will be no bidders at the sale. As a matter of fact, there will probably be no sale under the deed of trust anyway, for the construction lender might be wise to proceed initially with a judicial foreclosure to avoid losing the period of time for publication leading up to the scheduled sale, which would be aborted upon suit being filed by the junior lienor. The *Seitz* decision cited[81]

> The development of judicial foreclosure and sale gave rise to various efforts to circumvent the time consuming and relatively expensive procedures which it required. One such effort was the development of the deed of trust which is utilized in many states, and generally considered the same as a mortgage. The title is conveyed to a trustee upon a trust to reconvey to the grantor when the obligation is satisfied, and in the event of a default to sell the property, usually by public sale. In many respects, it is similar to another widely accepted method of avoiding judicial foreclosure through a contractual power of sale contained in the mortgage whereby the mortgagee is empowered to sell the property in the event of default. The utilization of the power of sale is frequently regulated by state statute and some states do not permit it at all.

Id.

[81] 367 So. 2d at 441.

with approval the long line of cases in Mississippi that has established the delicate balance between the rights of construction lenders and those of materialmen and laborers.[82] It is ironic that the case which purports to approve this balance should be the force which disrupts such a long standing relationship.

It is respectfully suggested that the Mississippi Supreme Court take the first opportunity to overrule its decision in *Seitz* and restore order to a vital industry of this state.

C. *The Uniform Land Transactions Act*

The National Conference of Commissioners on Uniform State Laws began work on the Uniform Land Transactions Act (ULTA)[83] in 1969. The ULTA received final approval from the Commissioners in 1975,[84] but the proposed Act was extensively amended in 1977.[85] The Act consists of three articles: Article 1 contains definitions and general provisions which apply to both sales and security transactions; Article 2 deals with leases and sales of real estate; and Article 3 covers secured transactions, rights of debtors and creditors as to the real estate, and provisions with respect to foreclosure.[86] The aspiration of the commissioners on uniform laws is to create a body of uniform law[87] in the real property area which would be analogous to what has happened in the commercial law area with the Uniform Commercial Code.[88] However, upon submission to the various states for adoption, the ULTA has received a rather tepid reception, for no state has yet adopted the Act in its entirety.[89] Nevertheless, prognosticators say that in due time the ULTA will be adopted in whole or in part by a substantial number of states.[90]

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[82] The lien of a deed of trust securing a construction loan has priority over mechanics' and materialmen's liens only to the extent that: (a) the funds disbursed actually went into the construction, or (b) the construction lender used reasonable diligence in disbursing the construction loan. *See* North Am. Mortgage Investors v. Mississippi Hardware Co., 360 So. 2d 1203, 1205-06 (Miss. 1978); Wortman & Mann, Inc. v. Frierson Bldg. & Supply Co., 184 So. 2d 857, 860-61 (Miss. 1966) (construction lender exercised reasonable diligence to see that funds were actually used in construction); Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 221, 150 So. 2d 416, 420 (1963) (construction lender must exercise reasonable diligence and has priority only to extent funds actually used in construction); Deposit Guar. Bank & Trust Co. v. J.F. Weaver Lumber Co., 215 Miss. 183, 191, 60 So. 2d 598, 600 (1952) (bank took no precaution to see that advances actually went into construction); First Nat'l Bank v. Virden, 208 Miss. 679, 685, 45 So. 2d 268, 270 (1950) (priority to extent funds went into construction; advancement of proceeds with reasonable diligence); Weiss, Dreyfous & Seiferth, Inc. v. Natchez Inv. Co., 166 Miss. 253, 259-60, 140 So. 736, 738 (1932) (priority between construction lien and deed of trust securing advances actually used in construction). *See generally* Annot., 80 A.L.R.2d 179 (1961).

[83] All citations to ULTA in this article will be to UNIFORM ACTS, Land Transactions, Simplification of Land Transfers, Condominium (West 1978).

[84] Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act,* 64 GEO. L.J. 1245, 1245 n.1 (1976).

[85] P. BERGFIELD, PRINCIPLES OF REAL ESTATE LAW 222 n.24 (1979).

The focus of the next section of this article will be upon the foreclosure procedures of the ULTA which have been acclaimed by the authors discussing the act.[91] Adoption of the essential provisions of the ULTA foreclosure procedures would involve no change in what has been Mississippi's basic philosophy of foreclosure because power of sale foreclosure by advertisement is the preferred method of foreclosure of security agreements under the ULTA.[92]

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[86] *Id.*

[87] ULTA is only one of a trilogy of proposed uniform laws in the real property area. The other two proposed acts are the UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT and the UNIFORM CONDOMINIUM ACT.

[88] *See* ULTA, Commissioners' Prefatory Note.

[89] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1979-80 REFERENCE BOOK 69 (Record of Passage of Uniform and Model Acts, as of August 1, 1979).

[90] *See, e.g.,* P. BERGFIELD, *supra* note 85, at 222.

[91] *See, e.g.,* Pedowitz, *Mortgage Foreclosure Under the Uniform Land Transactions Act (As Amended),* 6 REAL EST. L.J. 179, 179 (1978). Pedowitz states that:

> Whatever doubts may exist as to the need for all of the Uniform Land Transactions Act (ULTA) or the lack of enthusiasm for a uniform act by the real estate bar, its mortgage foreclosure provisions should find considerable support among mortgage lenders and those government and private agencies that hold substantial mortgage portfolios. Those provisions go a long way toward fulfilling the avowed purposes of ULTA, "to simplify, clarify and modernize the law," notwithstanding some reservations about the adequacy of the various consumer protection provisions in the Act.

Id.

[92] *Id.* at 179. Pedowitz comments: "In the states where power of sale foreclosure is the norm [as in Mississippi], the recognition by the drafters that this method is to be favored will merely mean relatively minor changes in procedure, but none in basic philosophy." *Id.* at 187-88.

D. Proposed Modifications to Existing Power of Sale Foreclosure Procedures in Mississippi

Article 3 part 5 of ULTA contains thirteen sections which set forth the foreclosure procedures under the proposed uniform law. The ULTA foreclosure procedures are interrelated with many other provisions throughout the entire act and therefore a detailed analysis of these procedures is beyond the scope of this article. Also, there are several articles already in print that thoroughly analyze the ULTA's foreclosure proposals.[93] The purpose of the following discussion is to highlight several of the ULTA procedural proposals that, if adopted in Mississippi, would greatly improve our power of sale foreclosure procedures. This discussion is not intended as an endorsement of the ULTA in general or even of the ULTA foreclosure procedures in particular, for even though the foreclosure procedures offer many beneficial suggestions, if this author were to give the subject more detailed treatment with suggested legislative language, some rather substantial modification to the Uniform Act would be recommended. Nevertheless, it is suggested that the Mississippi Legislature consider adopting the approaches suggested by the ULTA in the areas outlined below.

1. Notice of Foreclosure to the Debtor

As discussed above, the current power of sale foreclosure procedures in Mississippi require no actual notice to the debtor and the publication must list only the name of the original mortgagor.[94] ULTA would require the foreclosing party to send a "Notice of Intention to Foreclose" by registered or certified mail and by ordinary first class mail[95] to the debtor, to any person in possession, and to virtually all persons who might have any interest in the foreclosure.[96] The written notice of foreclosure is a prerequisite to commencing the foreclosure, and the notice is calculated to make the debtor aware of his or her rights and liabilities in the situation.[97] Adoption by Mississippi of the "Notice of Intention to Foreclose" requirement would cure many of the deficiencies in the existing procedure.

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[93] *E.g.*, Bruce, *supra* note 84; Martin, *Secured Transactions Under Article 3 of the Uniform Land Transactions Act*, 1976 Wis. L. Rev. 899; Pedowitz, *supra* note 91.

[94] *See* text accompanying footnotes 40 through 46 *supra*.

[95] ULTA § 3-506(a).

[96] *Id.* § 3-505(f).

2. Notice of the Sale

Prior to foreclosure under a power of sale, the ULTA also requires that notice of the intended sale be given.[98] Although this notice is different from the "Notice of Intention to Foreclose" discussed above, the "Notice of Sale" may be included in the notice of intention to foreclose or may be given at a later time.[99] Under the ULTA, the sale may not be held until five weeks after the sending of the notice of sale[100] which would offer little variation from Mississippi's current schedule for foreclosure which requires advertisement "for three consecutive weeks preceding such sale"[101] with the sale to be held within one week of the final publication.[102] However, the ULTA approach to the standards for advertising and conducting the sale is totally different from the present approach in Mississippi and most states. Rather than setting rigid guidelines, the basic standard is that the advertising and sale must be conducted in a reasonable manner.[103]

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[97] *Id.* § 3-506(b) mandates that the "Notice of Intention to Foreclose" contain the following information:

(1) the particular security interest to be foreclosed;

(2) the nature of the default claimed;

(3) that the secured creditor has accelerated maturity of the debt, if that is the case;

(4) any right the debtor has to cure the default, the amount to be paid or other action necessary to cure, and the time within which the cure must take place;

(5) the methods by which the debtor's ownership of the real estate may be terminated;

(6) any right the debtor has to transfer the real estate subject to the security interest to another person or to refinance the obligation, and the transferee's right, if any, to succeed to the rights of the debtor in curing the default;

(7) the circumstances under which the debtor's right to possession will be terminated, and that on termination he may be evicted by judicial process;

(8) the right of the debtor to any surplus from a sale and, if the debtor is or may be liable for any deficiency, a statement of the circumstances under which the deficiency will be asserted;

(9) that no deficiency may or will be claimed, if that is the case;

(10) if the secured creditor intends to include in the notice of intention to foreclose a notice of sale under a power of sale (§ 3-508(a)), or of intention to institute judicial proceedings (§ 3-505(b)), he shall so state and comply with the provisions of § 3-508(a) or 3-508(b) as the case may be; and

(11) the right of the debtor under § 3-513 to apply for a court order controlling the foreclosure.

[98] *Id.* § 3-507(b).

[99] *Id.*

[100] *Id.* § 3-508(a).

3. Notice to Junior Lienors

The ULTA requires the notice of sale to be sent to any person who has a recorded interest in the real estate which would be cut off by the sale, if the interest was on record seven weeks before the date set for the sale.[104] This provision would cure the present lack of notice to junior lienors as discussed in section III *B* 2 above.

4. The Sale Price

There are several proposals in the ULTA that, if adopted, should help to bring more bidding to foreclosure sales in Mississippi. The reasoning behind the ULTA approach to notice requirements is explained in the Commissioners' Comment as follows:

> This section . . . separates the notice requirement into two functions: giving notice to potential purchasers that land is available for sale; and giving notice to persons already having an interest in the land, such as the debtor and junior lienors, that their interests are about to be cut off. It thus rejects the existing rule in many jurisdictions that advertisement of the sale in a legal publication as a legal notice satisfies both functions of notice of sale.[105]

The thrust of the ULTA requirement that the sale be conducted in a reasonable manner is to ensure that the person conducting the sale use the ordinary sales methods that would be used by a private owner voluntarily selling his land. The standard Mississippi procedure of placing the advertisement only in the legal notices would probably not qualify as a commercially reasonable method of advertising the foreclosure sale.[106]

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[101] MISS. CODE ANN. § 89-1-55 (1972).

[102] Crump v. Tucker, 149 Miss. 711, 717, 115 So. 397, 399 (1928).

[103] ULTA § 3-508(a).

[104] *Id.*

[105] *Id.*, Commissioners' Comment 1.

Under ULTA procedures, bids do not have to be in cash. The successful bidder must deposit at least ten percent of the bid price in cash or bank obligation and is then given five weeks to complete the transaction. If the successful bidder should then default, the foreclosing creditor is given the option of seeking specific performance of the contract or reselling the property through another foreclosure and retaining the bidder's deposit as liquidated damages to be applied in the same manner as the proceeds of a completed sale.[107]

All of the major problems concerning depressed sales prices in Mississippi that were discussed in section III *B* 4 above would be cured by the ULTA procedures. Under the Act all persons with an interest in the property should receive actual notice of the foreclosure sale. Potential bidders will be reached through ordinary sales channels such as real estate agents and advertisements in the real estate or financial sections of the newspaper. At the sale itself, bidders will be able to make a reasonable down payment and then have up to five weeks to arrange financing for the balance of the purchase price. The combination of these changes should assure bids at foreclosure sales that are much closer to market value than the depressed sales prices brought at forced sales in Mississippi today.

5. Distribution of Proceeds of Sale

The ULTA provides a standard listing of the application of the proceeds from a foreclosure sale.[108] Codification of this standard list would give solace to foreclosing creditors in Mississippi who are currently given no guidance with regard to application of surplus proceeds.

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[106] *See id.* (discussing the requirements of "reasonableness").

[107] *Id.* § 3-508(b).

[108] *Id.* § 3-510.

6. Finality of Sale

Under the ULTA, just as in current Mississippi practice, there is no right of redemption after sale. However, in an attempt to further assure that the sale price will be close to the real market value of the property,[109] the commissioners have provided that a good faith purchaser at the power of sale foreclosure acquires a good title, even if the foreclosing party fails to comply with any of ULTA's foreclosure requirements.[110] This provision will undoubtedly spark controversy, for it assumes that all foreclosing creditors have sufficient financial responsibility to compensate the aggrieved party whose rights were disregarded.[111] However, it seems that the goal of alleviating depressed sales is worth what appears to be small risk to debtors. The major reason why such risk to debtors is assessed as being small is that a failure on the part of the creditor to observe the basics of the statutory requirements would result in a void sale as a violation of constitutional due process.[112]

IV. CONCLUSION

The purpose of this article has been twofold. The first purpose was to acquaint the reader with some basic priority problems in a typical land development project and offer some caveats and drafting suggestions with regard to subordination agreements. The second purpose of this article was to point out what are perceived to be serious problems that currently exist with power of sale procedures in Mississippi and offer suggestions for improvement. It is hoped that the article will reach three distinct groups of readers. First, the article has been addressed to the practitioner in the real estate area with the aspiration that the caveats and drafting suggestions may help someone avoid a few of the many pitfalls that lurk in this area of the law. Second, the article has been addressed to the Mississippi Supreme Court with the respectful suggestion that the court, when given appropriate opportunity, clarify the priority and power of sale foreclosure validity problems engendered by the court's decision in *Guaranty Mortgage Co. v. Seitz.*[113] The final portion of the article has been addressed to the Mississippi Legislature. The power of sale foreclosure procedures in Mississippi are in dire need of revision. It is submitted that the suggested changes based upon the ULTA proposals as outlined above would not substantively alter existing Mississippi law, yet would cure many of the existing problems with power of sale foreclosures in Mississippi.

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[109] The Commissioners' Comment following *id.* § 3-511(a) states:

> This section is designed, like the similar section in UCC (Section 9-504(4)), so that the purchaser at the sale takes free of interests of the debtor and all subordinate parties. This is intended to eliminate the necessity of a rigorous examination to determine whether the foreclosure transaction complies with the statutory requirements in meticulous detail. The purpose of freeing the purchaser from the risk of the faulty foreclosure is to further assure that the sale price at the foreclosure sale will be more closely related to the real market value of the property thus liquidating the debt for the best interest of the lender and borrower.

[110] *Id.* § 3-511(a).

[111] *Id.* § 3-513; Pedowitz, *supra* note 91, at 194.

[112] Pedowitz, *supra* note 91, at 194.

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[113] 367 So. 2d 438 (Miss. 1979). On November 26, 1980, the Mississippi Supreme Court cited *Seitz* as controlling authority in Deposit Guar. Nat'l Bank v. E.Q. Smith Plumbing & Heating, Inc., No. 52,198 (Miss. Nov. 26, 1980). This most recent pronouncement does not, however, deal with the foreclosure problems discussed *supra.* It should be noted that as this article goes to the printer, the time to petition for rehearing in No. 52,198 has not expired.

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1979 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

Decisions rendered by the Mississippi Supreme Court in 1979 affecting the administrative law area[1] centered on the application of Mississippi's Worker's Compensation Act.[2] The

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[1] Other decisions of the 1979 supreme court concerning the area of administrative law include: (1) judicial review: Little v. City of Jackson, 375 So. 2d 1031, 1033 (Miss. 1979) (dismissal before expiration of opportunity to respond in writing to charges against nonprobationary Civil Service employee held denial of property without due process of law; however, such denial cannot be raised initially on appeal); Collins v. Van Zant, 375 So. 2d 404, 405 (Miss. 1979) (suit for preliminary and permanent injunction to allow inspection of bar examination questions and answers and to license proponents to practice law based on denial of due process dismissed for mootness); City of Jackson v. Capital Reporter Publishing Co., 373 So. 2d 802, 807-08 (Miss. 1979) (decision of council in award of contract for legal publication was fairly debatable and not shown to be arbitrary, capricious, discriminatory, illegal or without substantial basis); Damson Oil Corp. v. Southeastern Oil Co., 370 So. 2d 225, 229 (Miss. 1979) (review of Oil and Gas Board decisions limited to inquiry as to support by substantial evidence, arbitrariness, capriciousness, ultra vires or violation of constitutional rights); Robbins v. Mississippi State Highway Comm'n, 369 So. 2d 765, 768 (Miss. 1979) (regulation prohibiting signs adjacent to or within 500 feet of interchange statutorily authorized and not more restrictive than the statutes); Mississippi State Tax Comm'n v. Piggly Wiggly Ala. Distrib. Co., 369 So. 2d 501, 504 (Miss. 1979) (fact findings taken as prima facie true but where decision overturned in judicial review, burden is on commission to show decision not manifestly contrary to weight of evidence); (2) Public Service Commission: Mississippi Pub. Serv. Comm'n v. Ancient Oaks Utils., Inc., 377 So. 2d 911, 912 (Miss. 1979) (denial by commission of authority to install water meters on customers' connections held in contravention of commission rule requiring meters); Mississippi Pub. Serv. Comm'n v. AAA Anserphone, Inc., 372 So. 2d 259, 264 (Miss. 1979) (existing facility rule in certification of public convenience not controlling where issuance does not interfere with or duplicate existing service or result in waste); City of Kosciusko v. Mississippi Power & Light Co., 370 So. 2d 1339, 1341 (Miss. 1979) (exempt municipal utility cannot intrude into regulated utility's certified area by annexation); Bay Springs Tel. Co. v. Mississippi Pub. Serv. Comm'n, 370 So. 2d 694, 696 (Miss. 1979) (denial of rate increase which does not overstate toll revenue does not violate due process); Rebel Motor Freight, Inc. v. Kerr, 367 So. 2d 446, 448 (Miss. 1979) (certificate of convenience requires finding existing service inadequate, that carrier be notified of such and be given opportunity to correct); Mississippi Pub. Serv. Comm'n v. Mississippi Power Co., 366 So. 2d 656, 660 (Miss. 1979) (where commission failed to include coverages required for loans and preferred stock sales in considering proposed rate increase and evidence of financial expert at trial was based on unauthenticated computer tapes, its order was not supported by substan-

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tial evidence).

Other opinions concerning miscellaneous boards and commissions include: Buse v. Mississippi Employment Security Comm'n, 377 So. 2d 600, 602 (Miss. 1979) (vacation pay entitlement upon exit constitutes wages the payment of which cannot be grounds for suspension of unemployment benefits); Miller v. Oktibbeha County Democratic Comm., 377 So. 2d 917, 918 (Miss. 1979) (letters of contest of election dismissed for being unsworn as originally filed with Democratic Executive Committee, second sworn petition dismissed as not filed forthwith); Newman v. City of Biloxi, 372 So. 2d 295, 295-97 (Miss. 1979) (policeman's dismissal for cause based on failure to turn in evidence, accompanied by hearing and appellate review, does not violate due process); Cane v. Mississippi Employment Security Comm'n, 368 So. 2d 1263, 1263-64 (Miss. 1979) (failure to mail notice of disqualification to unemployment compensation claimant at last known address causes time for appeal to run from actual notification); West v. Greene County Bd. of Supervisors, 368 So. 2d 1260, 1262 (Miss. 1979) (board meeting that did not deny public right to attend and did not involve fraud or chicanery did not violate due process of taxpayers); Mississippi State Bar v. Attorney-Respondent, 367 So. 2d 179, 183 (Miss. 1979) (attorney is not compelled to respond to subpoena duces tecum prior to filing of formal complaint but must obey summons issued after formal committee complaint).

[2] MISS. CODE ANN. §§ 71-3-1 to -113 (1972 & Supp. 1979). Other 1979 Mississippi Supreme Court decisions addressing the worker's compensation area, not included in textual discussion, are: Coleman v. Chattanooga Container Corp., 377 So. 2d 606, 608 (Miss. 1979) (burden in worker's compensation cases is upon claimant to establish by substantial evidence that injury both arose out of and was sustained in course of employment; decision of commission based upon substantial evidence will not be overturned); Smith & Johnson, Inc. v. Eubanks, 374 So. 2d 235, 238 (Miss. 1979) (travel to secure meals when employee required to remain on location is reasonably incident to job performance); Sardis Luggage Co. v. Wilson, 374 So. 2d 826, 829 (Miss. 1979) (award of permanent partial disability requires proof of unsuccessful effort to find any other employment); Azwell v. Franklin Assocs., 374 So. 2d 766, 771 (Miss. 1979) (employer and carrier liable for statutory penalties for discontinuing compensation payments); Flemon v. State Poultry Co., 373 So. 2d 273, 276 (Miss. 1979) (203 interrogatories over six year period not harrassment, oppression or excessive expense to claimant); Evans v. Continental Grain Co., 372 So. 2d 265, 268-69 (Miss. 1979) (judicial review appropriate where reviewing court is left with conviction that commission mistaken in findings of fact); Western Elec., Inc. v. Ferguson, 371 So. 2d 864, 865-68 (Miss. 1979) (where per diem is in part travel allowance, exception to going and coming rule exists); Hart v. Jackson Cartage Co., 371 So. 2d 405, 406 (Miss. 1979) (where testimony of doctor would have been competent if given in person, claimant is entitled to develop claim through competent testimony); Bechtel Constr. Co. v. Bartlett, 371 So. 2d 398, 401 (Miss. 1979) (hernia compensable where company nurse steered claimant away from consulting a physician); Quaker Oats Co. v. Miller, 370 So. 2d 1363, 1366 (Miss. 1979) (two year statute of limitations under MISS. CODE ANN. § 71-3-35 (1972) begins when claimant as reasonable man knows nature, seriousness and work connection of disease); Georgia-Pacific Corp. v. McLaurin, 370 So. 2d 1359, 1361 (Miss. 1979) (unsworn reports of claimant's doctor, not present or available for cross examination, does not satisfy commission rule requiring that evidence considered be relevant and competent); Mississippi Power Co. v. Jones, 369 So. 2d 1381, 1387-88 (Miss. 1979) (MISS. CODE ANN. § 71-3-71 (1972) providing for

court made significant rulings which strengthened the exclusivity of the worker's compensation remedy,[3] clarified the method of determining the average weekly wage of persons injured in part-time employment,[4] established guidelines for the use of medical reports as evidence[5] and determined that statutory provisions for reimbursement of insurers from the proceeds of suits against third party tortfeasors include punitive damages.[6]

The Mississippi Supreme Court rendered fourteen worker's compensation decisions during 1979. The following textual discussion will treat three of these decisions, one rejecting the dual capacity doctrine,[7] one in which amenability of an employer's officers and agents to third party tort actions for negligence was denied,[8] and another wherein the court announced that the determination of the average weekly wage of part-time employees does not include wages earned in other employment.[9]

I. The Dual Capacity Doctrine

The statutory arrangement under the Mississippi Worker's Compensation Act,[10] like all similar acts, is an exchange in which

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repayment to insurer of amounts paid as compensation and medical expenses includes punitive damages).

[3] Trotter v. Litton Syss., Inc., 370 So. 2d 244 (Miss. 1979) (dual capacity doctrine should not be applied; employer's affirmative defense sustained). *See* notes 10 through 42 and accompanying text *infra;* Brown v. Estess, 374 So. 2d 241, 242-43 (Miss. 1979) (Worker's Compensation Act is exclusive remedy; action barred against worker's employer). *See* notes 43 through 93 and accompanying text *infra.*

[4] Sullivan v. City of Okolona, 370 So. 2d 921, 922-24 (Miss. 1979) (earnings from concurrent employments not to be used in determination of average weekly wage). *See* notes 94 through 116 and accompanying text *infra.*

[5] Georgia-Pacific Corp. v. McLaurin, 370 So. 2d 1359, 1362-63 (Miss. 1979).

[6] Mississippi Power Co. v. Jones, 369 So. 2d 1381, 1387-88 (Miss. 1979). *See* Insurance section notes 91 through 109 and accompanying text *infra.*

[7] Trotter v. Litton Syss., Inc., 370 So. 2d 244, 247 (Miss. 1979) (dual capacity doctrine should not be applied; employer's affirmative defense sustained). *See* notes 10 through 42 and accompanying text *infra.*

[8] Brown v. Estess, 374 So. 2d 241 (Miss. 1979) (Worker's Compensation Act is exclusive remedy; action barred against worker's employer). *See* notes 43 through 93 and accompanying text *infra.*

[9] Sullivan v. City of Okolona, 370 So. 2d 921, 924 (Miss. 1979) (earnings from concurrent employments not to be used in determination of average weekly wage). *See* notes 94 through 116 and accompanying text *infra.*

[10] Miss. Code Ann. §§ 71-3-1 to -113 (1972 & Supp. 1979).

the employee relinquishes the right to sue for common law damages[11] for injuries arising from the employment context, to gain no-fault employer liability for statutorily prescribed damages.[12]

Section 71-3-9 of the Mississippi Code[13] states that the remedy provided by worker's compensation law is exclusive. This section immunizes employers from tort liability to employees for injuries received on the job. Section 71-3-71,[14] on the other hand, authorizes suits against third parties.[15] The modern jurisprudential trend is toward more adequate compensation for injury.[16] Every American worker's compensation system preserves the employee's right to sue third parties whose liability is undetermined by statute.[17] The dual capacity doctrine, without contravening the exclusivity provisions, makes an employer normally immune from suit liable to an employee he injures if the injury is a violation of obligations independent of those imposed upon him as an employer but which flow from a second capacity which the employer occupies with regard to that employee.[18]

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[11] This, however, is probably a welcome forbearance, since at common law approximately eighty percent of cases for loss went uncompensated. S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 2-3 (1944).

[12] *See generally* Comment, *Workmen's Compensation and Employer Suability: The Dual-Capacity Doctrine,* 5 ST. MARY'S L.J. 818, 818 (1973-74).

[13] MISS. CODE ANN. § 71-3-9 (1972) provides in pertinent part:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer . . . .

[14] MISS. CODE ANN. § 71-3-71 (1972) provides in pertinent part:

> The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee shall not affect the right of the employee or his dependents to sue any other party at law for such injury or death . . . .

[15] Index Drilling Co. v. Williams, 242 Miss. 775, 784, 137 So. 2d 525, 528 (1962) (under the statute, acceptance of benefits does not affect right to sue any other party at law, limitation of liability applies only to employer and insurer). *See* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 71.10, at 2 (1976) (a stranger who injures employee in the course of employment should not be absolved of liability).

[16] *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 83, at 547-50 (4th ed. 1971) (discussing the availability of liability insurance as one explanatory factor).

[17] *See generally* McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers,* 37 TEX. L. REV. 389, 395 (1959). *See also* 2A A. LARSON, *supra* note 15, § 71.10, at 1 (all statutes but two preserve the right).

[18] 2A A. LARSON, *supra* note 15, § 72.80, at 112-17.

The doctrine rests upon the proposition that when an employer assumes such an additional capacity, he occupies, with respect to the employee, the position of a third party and consequently should be liable under the rationale of third party actions generally.[19] Worker's compensation liability is based upon the relationship of the employee to the employment in which he is injured.[20] Liability under the dual capacity doctrine, however, rests upon the presence of obligations unrelated to those flowing from the employ.[21]

Separate sources of obligation, sufficient under the dual capacity doctrine, have been found in the tortious conduct of investigations by insurance carriers,[22] the ownership of property,[23] and products liability,[24] although other bases have been rejected.[25]

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[19] Comment, *supra* note 12, at 819.

[20] Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423 (1923).

[21] Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8, 15 (1952) (chiropractor whose negligent treatment aggravated condition of employee injured in course of employment, found vulnerable to common law suit as a person other than employer). *See also* Robinson v. Hamilton Ave. Hosp., 34 A.D.2d 1059, 312 N.Y.S.2d 41, 42 (1970) (malpractice in treatment of hospital employee by owner of hospital occurred in a medical practitioner-private patient relationship and, therefore, did not toll the running of the worker's compensation claim period).

[22] Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 630-31, 498 P.2d 1063, 1073, 102 Cal. Rptr. 815, 825 (1972) (insurance carrier held liable for tortious nonmedical case investigation). *But see* Denman v. Duval Sierrita Corp., 27 Ariz. App. 684, 558 P.2d 712, 713 (1976) (suit against self-insuring employer as an insurance carrier held an illogical attempt to circumvent provisions of worker's compensation act); Swain v. J.L. Hudson Co., 60 Mich. App. 361, 230 N.W.2d 433, 434 (1975) (common law action against self-insuring employer's insurer capacity denied).

[23] Reed v. The Steamship Yaka, 373 U.S. 410, 415-16 (1963) (shipowner-employer held liable under Longshoreman's Act for compensation benefits and for injuries arising out of unseaworthiness); Smith v. M/V Captain Fred, 546 F.2d 119, 123 (5th Cir. 1977) (repairman's suit against shipowner-employer as a third party allowed); State v. Luckie, 145 So. 2d 239, 243 (Fla. 1962) (general contractor-landowner may be held liable as owner of premises); Marcus v. Green, 13 Ill. App. 3d 699, 300 N.E.2d 512, 517-18 (1973) (employer-part owner found liable in his capacity as part owner of premises on which employee injured, on the basis of duty originating from that ownership). *Contra,* Carey v. Coca-Cola Bottling Co., 48 Ill. App. 3d 482, 363 N.E.2d 400, 401-02 (1977) (Structural Work Act action against owner-employer wherein dual capacity doctrine was held inapplicable due to lack of separate entities); Frith v. Harrah S. Shore Corp., 92 Nev. 447, 552 P.2d 337, 339, 341 (1976) (in a suit against employer-owner for violation of a safety act, the court held that violation of the act did not create a private right of action and that immunity was not diminished due to ownership); Minsky v. Baitelman, 281 App. Div. 910, 120 N.Y.S.2d 86, 87 (1953) (action against owner of premises who was partnership member by an employee of the partnership denied); Billings v. Dugger, 50 Tenn. App. 403, 362 S.W.2d 49, 53 (1962) (common law action against general building contrac-

Last year, in *Trotter v. Litton Systems, Inc.*,[26] an employee who injured his thumb in the course of employment lost the use of that thumb as the result of infection caused by suturing, which was done by an unlicensed, unqualified first aid station attendant/employee provided by Trotter's employer.[27] The basis of Trotter's suit was his employer's negligence in the provision of improper medical care[28] and in the provision of unqualified personnel in the aid station.[29] The injured employee's advancement of the dual capacity doctrine was rejected by the supreme court, which embraced the employer's contention that worker's compensation was the employee's sole remedy.[30] The court stated that an employer held liable for compensation as a result of the statutory enactment is entitled to the statute's concomi-

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tor-employer who was part owner of premises denied).

[24] Douglas v. E. & J. Gallo Winery, 69 Cal. App. 103, 137 Cal. Rptr. 797, 799 (1977) ("cause of action [will lie against employer] . . . provided product involved is manufactured . . . for sale to the public rather than . . . for the sole use of employer"); Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492, 496 (1976) (leased employee allowed to sue employer-manufacturer of defective tire which caused his injury, hazard found not peculiar to conditions of employment but one common to the public). *Contra,* Winkler v. Hyster Co., 54 Ill. App. 3d 282, 369 N.E.2d 606, 609-10 (1977) (welder injured by lift manufactured by employer, held, exclusivity clause applies to strict product liability); Needham v. Fred's Frozen Foods, Inc., 359 N.E.2d 544, 544-45 (Ill. App. 1977) (exclusivity upheld in employee's action for injuries sustained in use of pressure cooker designed by employer); Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d 787, 354 N.E.2d 553, 556-58 (1976) (employer modification of machine safety controls held not to create legal obligations separate from those of employer).

[25] Neal v. Roura Iron Works, Inc., 66 Mich. App. 273, 238 N.W.2d 837, 840 (1975) (vendee-vendor relationship held an unavailing basis).

Mere separateness of governmental units has proven an unavailing basis with regard to municipal governments, Walker v. City and County of San Francisco, 97 Cal. App. 901, 219 P.2d 487, 490-91 (1950), state government departments, Osborne v. Commonwealth, 353 S.W.2d 373, 375-76 (Ky. 1962), and federal employee divisions, Miller v. United States, 307 F. Supp. 932, 933 (E.D. Va. 1969). *See generally* 2A A. LARSON, *supra* note 15, § 72.80, at 112-23 (discussion of unsuccessful attempts to invoke the dual capacity doctrine).

[26] 370 So. 2d 244 (Miss. 1979).

[27] *Id.* at 244-45.

[28] MISS. CODE ANN. § 71-3-15 (1972) provides in pertinent part: "The employer shall furnish . . . medical . . . attendance or treatment . . . ."

[29] 370 So. 2d at 245.

[30] *Id.* at 247.

tant immunity from common law liability.[31] The court also expressed the view that imposition of the dual capacity doctrine is a matter best left to the legislature.[32]

With regard to the liability of the injuring employee, a determination of the employee's status often has been the dispositive inquiry.[33] Under this approach if the employee is determined to be a coemployee[34] he enjoys immunity from suit,[35] but if he is found to be an independent contractor there is persuasive authority suggesting personal liability.[36] Although provision of medical care is required by statute, the statute does not require that it be provided by retained, on-site employees.[37] Imposing personal liability upon the aid station attendant would result in shifting to him the cost of conducting the enterprise, a result elementally contrary to the goals of worker's compensation.[38] Practically, such an approach may result in inadequate recoveries by plaintiffs and in onerous burdens on coemployees, who will be barred from contribution from their immune employers.[39]

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[31] *Id.* The court relied upon Dixon v. Ford Motor Co., 53 Cal. App. 3d 499, 507, 125 Cal. Rptr. 872, 877 (1976) (outlining the lack of success of the *Duprey* rationale as a legalistic machination to make inroads into the proper jurisdiction of the commission), Warwick v. Hudson Pulp and Paper Co., 303 So. 2d 701, 702 (Fla. App. 1974) (holding that aggravation of injury was compensable under the statute and that immunity necessarily follows from such statutory liability) and McAlister v. Methodist Hosp., 550 S.W.2d 240, 245-46 (Tenn. 1977) (literally interpreting immunity granted to employer as meaning that an employer can never be anything but an employer). The court reasoned that since aggravation of a preexisting injury was held compensable under the Mississippi Worker's Compensation Act in Universal Mfg. Co. v. Barlow, 260 So. 2d 827 (Miss. 1972), then provisions of the Act limiting the employer's liability exclusively to compensation effectively bar common law liability under the dual capacity doctrine. 370 So. 2d at 246-47.

[32] 370 So. 2d at 247.

[33] *See generally* Note, *The Malpractice Liability of Company Physicians,* 53 IND. L.J. 585 (1977-78) (discussion of various tests by which the employment relationship of company physicians may be determined).

[34] Garcia v. Iserson, 42 App. Div. 2d 776, 346 N.Y.S.2d 572, 574 (1973), *aff'd,* 33 N.Y.2d 421, 309 N.E.2d 420, 353 N.Y.S.2d 955 (1974) (a company physician is an exempt coemployee). *Contra,* Hoffman v. Rogers, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455, 459 (1972) (company physician held independent contractor).

[35] Reese v. Liberty Mut. Ins. Co., 473 F. Supp. 456, 458 (N.D. Miss. 1979); McCluskey v. Thompson, 363 So. 2d 256, 264 (Miss. 1978). For a listing of the states in which immunity is extended to coemployees, see Comment, *The Third Party Action—Expanding the Circle of Immunity: Coemployees,* 48 MISS. L.J. 87, 92 n.24 (1977). For a listing of the states allowing an injured employee to sue "any third party or person other than the employer," see *id.* at 93 n.26.

[36] Lemonovich v. Klimoski, 315 F. Supp. 1290, 1292 (W.D. Pa. 1970) (surgical liaison officer over whom employer had no control could be held liable); McKelvy v. Barber, 381 S.W.2d 59, 62-63 (Tex. 1964) (company physician over whom employer had no control could be held liable).

[37] MISS. CODE ANN. § 71-3-15 (1972). *Cf.* Mager v. United Hosps., 88 N.J. Super. 421, 212 A.2d 664, 667 (1965), *aff'd per curiam,* 46 N.J. 398, 217 A.2d 325 (1966) (New Jersey statute requiring employer to furnish medical and hospital services does not re-

Without regard to the motive for providing on-site medical care,[40] the employer in the instant case assumed additional obligations which arose from this separate capacity as provider of medical treatment.[41] The refusal of the supreme court to recognize the dual capacity doctrine in *Trotter* allows an employer to shield himself from liability for malpractice purely by the fortuity of the employment relationship.[42]

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quire employer or carrier to maintain and operate medical services clinic).

[38] *See* Madison v. Pierce, 156 Mont. 209, 478 P.2d 860, 863 (1970) ("cost of the product should bear the blood of the workman"); Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6, 9-10 (1952) (stating that purpose of worker's compensation is to shift economic loss of work-related accidents to the employer and ultimately to the consumer). *See generally* W. MALONE, M. PLANT & J. LITTLE, THE EMPLOYMENT RELATION 46 (1974).

[39] The immunity granted by the compensation acts to employers has been held to shield employers against suits for contribution by third party tortfeasors. Seaboard Coastline R.R. v. Smith, 359 So. 2d 427, 429-30 (Fla. 1978). *See* Williams v. Ashland Chem. Co., 52 Ohio App. 2d 81, 368 N.E.2d 304, 310-12 (1976) (employer may waive immunity only by express agreement). *Contra,* Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679, 689 (1977) (limiting allowable contribution by employer to amount of liability under compensation act).

[40] *See* Mager v. United Hosps., 88 N.J. Super. 421, 212 A. 2d at 667, stating, "Defendant's operation of such a clinic was clearly in its own interest . . . [and] was obviously a means adopted to reduce costs and achieve possible economies." *Id. See also* Larson, *Workmen's Compensation Insurer as Suable Third Party,* 1969 DUKE L.J. 1117, 1137 (savings on malpractice premiums one possibility); 48 U. CIN. L. REV. 187, 193 (1979) (suggesting that tort suits against employers will lead to restricted dual capacity services).

[41] In Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8, 15 (1952), in addition to the duty to provide medical services under CAL. LAB. CODE § 4600 (Deering Supp. 1973) the chiropractor-employer was found to owe a second duty, which was to give nonnegligent medical care. *See generally* 2A A. LARSON, *supra* note 15, § 72.80, at 118 ("The answer . . . lies in the difference between [the employer's] providing services . . . [by] paying for them and providing services by . . . performing them [himself].").

[42] Lewis v. Gardner Eng'r Corp., 254 Ark. 17, 491 S.W.2d 778, 784 (1973) (Fogleman, J., dissenting) ("why should . . . [the employer] be relieved of liability as designer and manufacturer by the fortuitous circumstance that . . . [he] happened to be the employer of the injured party in an unrelated undertaking?"); Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488, 490-91 (1978) (employer-hospital found liable in third

II. MANAGERIAL COEMPLOYEE LIABILITY

Worker's compensation legislation[43] as a method of assuring the injured employee a guaranteed and immediate, albeit minimum, recovery for work-related injury,[44] is a compromise[45] of the possibility of higher recovery for certainty of compensation[46] irrespective of fault.[47] In Mississippi the no-fault or strict liability imposed by worker's compensation for work-connected injury is accompanied by common law tort claim immunity of coemployees[48] and employers.[49] The quid pro quo[50] concept is funda-

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party suit for aggravation of injuries in failing to diagnose condition; employee's need for protection from malpractice is neither more nor less than that of another's employee); Note, *supra* note 33, at 596 (the dual capacity doctrine is a response to the inconsistency of shielding a company physician "merely because of the fortuity of the employment relationship"). *Cf.* Davis, *Workmen's Compensation—Using An Enterprise Theory of Employment to Determine Who is a Third Party Tort-Feasor,* 32 U. PITT. L. REV. 289, 300 (1971) ("A refusal to recognize an employer's dual capacities is more likely to be based upon the presumed difficulty of administering a system where lines must be drawn to separate the multiple employer's businesses or employments.").

[43] Worker's compensation originated in Germany in 1884, was imported to this country around the turn of the century, 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.10, at 33 (1978), and had been implemented in all but eight states by 1920. *Id.* § 5.30, at 39.

[44] Comment, *Workmen's Compensation: Third Party Actions in South Dakota,* 18 S.D.L. REV. 423, 429 (1973). For a general discussion of the functions of worker's compensation, see Larson, *Basic Concepts & Objectives of Workmen's Compensation,* in I SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 31 (1973).

For a general discussion of differences in state worker's compensation statutes, see Brooke, *Administering Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York & Wisconsin,* in III SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 77 (1973).

[45] The principle of strict liability of the employer conflicts with the principle of liability based on fault. 26 ARK. L. REV. 588, 589 (1973).

[46] *Cf.* 48 U. CIN. L. REV. 187, 193 (1979) (election of remedies is a gamble in which the employer has the defenses of contributory negligence and assumption of risk; election of remedies is contrary to the assured recovery policy underlying worker's compensation).

[47] *See* Comment, *supra* note 35, at 89 (employee surrenders common law right to recover to full extent of injury suffered).

[48] *See* McCluskey v. Thompson, 363 So. 2d 256, 264 (Miss. 1978) (wrongful death claim against allegedly negligent coemployee denied); Robertson v. Stroup, 254 Miss. 118, 124-25, 180 So. 2d 617, 620 (1965) (coemployees are not "any other party" within the Worker's Compensation Act's provisions). *See generally* Marks, Klein & Long, *Coemployee Suits Under Workmen's Compensation,* 26 FED'N INS. COUNSEL Q. 327 (1976) (discussing the implications and considerations of coemployee suits).

mental to the policy underlying worker's compensation acts.[51] The exclusivity of remedy has no effect upon the employee's claims against third parties.[52]

The vast majority of states permits common law recovery by the employee when injury is caused by a third party tortfeasor[53] on the theory that liability for fault may proceed unhindered once the policy of guaranteed recovery is fulfilled.[54] Liability of third party coemployees is permitted by slightly less than a majority of states;[55] conversely, immunity has been expressly extended to coemployees in the majority.[56] Immunity typically attaches only when the coemployee is acting within the course of employment[57] and does not extend to intentional wrongs.[58]

States recognizing third party coemployee actions[59] have done so on the following grounds: first, upon traditional rules of

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[49] *See* Trotter v. Litton Syss., Inc., 370 So. 2d 244, 246-47 (Miss. 1979) (employee's only remedy for injury sustained during course of employment is under Worker's Compensation Act); Stubbs v. Green Bros. Gravel Co., 206 So. 2d 323, 324-25 (Miss. 1968) (dismissal of tort action against employer on basis that worker's compensation provides the exclusive remedy); Index Drilling Co. v. Williams, 242 Miss. 775, 784, 137 So. 2d 525, 528 (1962) (employer is immune from tort action). *See generally* 1 A. LARSON, *supra* note 43, § 1.10, at 2 (setting forth the features of a typical worker's compensation act).

[50] *See* BLACK'S LAW DICTIONARY 1415 (4th ed. 1968) (the giving of one valuable thing for another).

[51] 2A A. LARSON, *supra* note 15, § 72.20, at 39.

[52] Index Drilling Co. v. Williams, 242 Miss. 775, 784, 137 So. 2d 525, 528 (1962). The scope of the frequently used phrase "some person other than the employer" has been a fertile ground for litigation. *See* 9 CUM. L. REV. 921, 926 nn. 31-33 (1978-79) (citing cases where the phrase has been held to include "company physicians, government officials, . . . [and] insurance carriers"). *See generally* 2A A. LARSON, *supra* note 15, § 72.10, at 1.

[53] *See* Note, *supra* note 52, at 925. *See also* 26 ARK. L. REV. 588, 589 (1973).

[54] Note, *supra* note 52, at 925. However, because of the recognition that double recovery would result in an unjustified windfall, the states have spawned a variety of schemes for the reimbursement of the innocent compensating employer. *Id.* (citing 26 ARK. L. REV. 588, 589 (1973)).

[55] For a list of states permitting liability, see Comment, *supra* note 35, at 93 n.26.

[56] For a list of states immunizing coemployees, see *id.*, at 92 n.24.

[57] 2A A. LARSON, *supra* note 15, § 72.20, at 39.

[58] *See* Elliott v. Brown, 569 P.2d 1323, 1327 (Alaska 1977) (worker's compensation is not the exclusive remedy when coemployee commits an intentional tort against a fellow employee); Jablonski v. Multack, 63 Ill. App. 3d 908, 380 N.E.2d 924 (1978) (same); Bryan v. Utah Int'l, 533 P.2d 892, 894 (Utah 1975) (policy of permitting intentional tort suits against fellow employees deters intentional injury).

[59] *See* Comment, *supra* note 35, at 93 n.26.

statutory interpretation;[60] second, that legislative intent could not be that a negligent party escape liability even though he has made no contribution toward the employee's remuneration[61] nor toward his compensation coverage,[62] in apparent contravention of the quid pro quo concept;[63] third, that such gratuitous protection for misconduct will increase the hazards of employment.[64]

The rationale typical of those jurisdictions that recognize third party actions generally while denying suits against fellow employees, is that allowing such suits defeats, by burdening the coemployee, the very purpose of the act which is to transfer the burden of work-related injuries to the employing enterprise.[65] The merger doctrine has also provided a basis for denying such suits.[66]

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[60] The two most prominent rules are the plain meaning rule requiring that the plain and usual meaning be applied in statutory construction and the presumption that statutes in derogation of the common law be strictly construed. For a case dealing with the plain meaning rule, see Wilson v. Hasvold, 86 S.D. 286, 194 N.W.2d 251, 253 (1972) (in determining if defendant was employer, words of statute were given their plain meaning). For an example of the strict construction rule, see Frantz v. McBee Co., 77 So. 2d 796, 799 (Fla. 1955) (refusal to read provision in derogation of common law into statute). *Contra,* McCluskey v. Thompson, 363 So. 2d 256, 261-64 (Miss. 1978) (opposing strictly construing statutes in derogation of the common law because it relegates statutes to a secondary status).

[61] Comment, *supra* note 44, at 425-26.

[62] *Id.* at 427. *See* Frantz v. McBee Co., 77 So. 2d 796, 799-800 (Fla. 1955) (employees are not immune from suits by fellow employees because they do not contribute anything toward worker's compensation).

[63] Comment, *supra* note 44, at 429. *But see* Comment, *supra* note 35, at 109 n.117 (suggesting that the coemployee receive immunity, should he injure someone, in exchange for the compromise of rights).

[64] *See* Tawney v. Kirkhart, 130 W. Va. 550, 44 S.E.2d 634, 641 (1947) (enhancement of danger against public policy); *accord,* Frantz v. McBee Co., 77 So. 2d 796, 800 (Fla. 1955) (quoting *Tawney*). *But see* Comment, *supra* note 7, at 109 n.113 (suggesting that the risk of injuring a coemployee arises as does the risk of injury itself from the fact of employment).

[65] Madison v. Pierce, 156 Mont. 209, 478 P.2d 860, 863-64 (1970) ("the cost of the product should bear the blood of the workman"); Comment, *supra* note 44, at 427. The enterprise liability theory is discussed generally in W. PROSSER, *supra* note 16, § 80, at 530-31. *See generally* Davis, *supra* note 42 (advocating the separation of the employments of the multiple enterprise employer on an enterprise basis with the result that an employer may be held liable as a third party tortfeasor when negligent conduct in one enterprise injures a workman employed and covered by compensation in another of the employer's enterprises).

[66] *See* White v. Ponozzo, 77 Idaho 276, 291 P.2d 843, 845 (1955) (employer and coemployee are merged into one entity).

The wrongful death action,[67] a relative newcomer,[68] is a derivative cause of action arising out of the wrong done to the decedent.[69] Wrongful death actions in Mississippi, for employment-related deaths, are statutorily supplanted by the exclusive remedy provided by worker's compensation.[70] However, where an employer within the ambit of the Worker's Compensation Act fails to comply, the proponents of a wrongful death action may elect to claim compensation under the Act or sue at law for damages.[71] The defenses of assumption of risk, contributory negligence and negligence of fellow servants are unavailable to the employer in the latter action.[72]

In *McCluskey v. Thompson*[73] the Mississippi Supreme Court disallowed a wrongful death claim against a coemployee[74] by embracing the enterprise liability theory, which holds a business liable for injuries which result as a natural consequence of the operation of the business.[75] The court also rejected the presumption that statutes in derogation of the common law should be strictly construed[76] and interpreted section 71-3-9 of the Mississippi Code as providing the exclusive remedy for the survivors of employees who suffer work-related deaths caused by the negligence of coemployees.[77]

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[67] For Mississippi's wrongful death provisions, see MISS. CODE ANN. § 11-7-13 (Supp. 1979).

[68] For a general discussion of the development of the wrongful death action, see W. PROSSER, *supra* note 16, § 127, at 901-02.

[69] *Id.* at 911. *Accord*, Harris v. Illinois Cent. R.R., 111 Miss. 623, 626-27, 71 So. 878, 878-79 (1916) (compromise of, or release from liability for injuries by injured person operates as bar to any subsequent suit founded on his death).

[70] MISS. CODE ANN. § 71-3-9 (1972) states in pertinent part:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to . . . anyone . . . entitled to recover damages at common law or otherwise from such employer . . . except that if an employer fails to secure payment of compensation . . . an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law . . . . In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

The predecessor of this provision has been upheld against constitutional attack. Allen v. R.G. Le Tourneau, Inc., 220 Miss. 520, 526, 71 So. 2d 447, 448 (1954) (held not violative of state constitution); Walters v. Blackledge, 220 Miss. 485, 505-19, 71 So. 2d 433, 441-46 (1954) (compensation act not violative of any provisions of state or federal constitutions).

[71] Hordge v. Yeates, 157 F. Supp. 411, 414 (S.D. Miss. 1957); Allen v. R.G. Le Tourneau, Inc., 220 Miss. at 527, 71 So. 2d at 448; MISS. CODE ANN. § 71-3-9 (1972). *See* note 13 *supra*.

[72] MISS. CODE ANN. § 71-3-9 (1972).

[73] 363 So. 2d 256 (Miss. 1978). For a general discussion of *McCluskey*, see pp. 11-16 *supra*.

[74] 363 So. 2d at 257. Plaintiff's decedent, a coemployee of the defendant, was killed when a portable light plant fell, allegedly due to the coemployee's negligence, and struck the decedent. *Id.*

In a 1979 wrongful death case, *Brown v. Estess*,[78] the plaintiffs, whose decedent had suffocated in a soybean bin while in the course of his employment, alleged in the lower court that the negligence of the general manager and of the individual members of the Board of Directors of the Madison County Cooperative for whom the deceased had worked, caused the decedent's death. On appeal from a directed verdict for the defendant Estess, the general manager, for failure of plaintiffs to make a case for negligence,[79] the proponents of the action contended that application of *McCluskey v. Thompson* would deny them due process of law as guaranteed by section twenty-four of the Mississippi Constitution and by the fourteenth amendment of the Constitution of the United States.[80]

Bypassing the negligence issue, the court, citing *Walters v. Blackledge*,[81] rejected the due process argument[82] and held, citing *McCluskey*, that worker's compensation law provides the exclusive remedy for the wrongful death of an employee resulting from the negligence of corporate officers acting within the scope of their authority and on behalf of the corporation.[83] The court reasoned that to hold otherwise would violate the purpose, philosophy and spirit of the Act[84] and would, because of the subrogation provisions of section 71-3-71 of the Mississippi Code, transfer to those conducting the business of the employer the costs of the enterprise to the extent of their solvency.[85] The Mississippi Supreme Court is not alone in upholding the constitutionality of the provision in its worker's compensation act immunizing coemployees; many courts in considering the same question have held that such provisions do not deny claimants' due process rights.[86]

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[75] *Id.* at 259. The court reasoned that permitting such suits would allow an employer or insurer to shift the burden of compensation to the coemployee under the indemnification provisions of MISS. CODE ANN. § 71-3-71 (1972). 363 So. 2d at 259. Such a result would be contrary to clear legislative intent. *Id.*

[76] 363 So. 2d at 261 (citing Madison v. Pierce, 156 Mont. 209, 478 P.2d 860, 865 (1970) (when the purpose of an act is frustrated because of the incompatibility of its provisions with those of the common law, such rights under the common law are eliminated by implication if not by express language)).

[77] 363 So. 2d at 258-64.

[78] 374 So. 2d 241 (Miss. 1979).

[79] *Id.* The court also granted a directed verdict for the members of the Board of Directors of Madison County, but no appeal was taken on that ruling. *Id.*

[80] *Id.* at 242.

[81] 220 Miss. 485, 71 So. 2d 433 (1954). *See* note 70 *supra*.

[82] 374 So. 2d at 242.

The popularity of actions against managerial coemployees has been attributed to the procurement by corporations of liability insurance covering such employees.[87] Problems arise, however, in determining whether a duty has been breached.[88] When the employer is held circuitously liable through the costs of providing executive officer liability coverage, exclusivity becomes merely a theoretical refuge.[89] When such coverage does not exist, liability "may prove as debilitating to . . . [the officer's] welfare as the original loss did to the injured worker's . . . ."[90]

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[83] *Id.* at 242-43.

[84] *Id.* at 243.

[85] *Id.*

[86] *See, e.g.,* Lowman v. Stafford, 226 Cal. App. 2d 31, 37 Cal. Rptr. 681, 684 (1964) (constitution does not forbid legislature's establishing of coemployee immunity); Mier v. Staley, 29 Ill. App. 3d 373, 329 N.E.2d 1, 7-8 (1975) (immunity for coemployees, as well as for officers and directors, held not violative of due process guarantee). *Contra,* Grantham v. Denke, 359 So. 2d 785, 787-89 (Ala. 1978) (immunity provisions held violative of state constitutional provisions protecting common law rights and remedies of injured parties); Halenar v. Superior Ct., 109 Ariz. 27, 504 P.2d 928, 930 (1972) (legislature may not interfere with constitutional right of employee to sue coemployee).

[87] Comment, *Workmen's Compensation—Executive Officer Liability,* 33 LA. L. REV. 325, 325 (1972-73).

[88] 9 CUM. L. REV. 921, 932 (1979). *Compare* Kruse v. Schieve, 61 Wis. 2d 421, 213 N.W.2d 64, 67 (1973) (duty to provide reasonably safe work place is nondelegable duty owed by corporate employer, not corporate officers) *with* Kerrigan v. Errett, 256 N.W.2d 394, 397 (Iowa 1977) (breach must be based upon personal fault rather than vicarious liability) *and* Craven v. Oggero, 213 N.W.2d 678, 682-83 (Iowa 1973) (delegation of duty to provide safe work place imposes personal duty on coemployee to whom delegation is made).

[89] Comment, *supra* note 87, at 333. *See* West v. Jessop, 339 So. 2d 1136, 1137 (Fla. Dist. Ct. App. 1976) (allowing third party actions in every case against corporate officers would emasculate the exclusivity concept).

In light of the legislature's tacit acceptance of the supreme court's interpretation of coemployee immunity in *McCluskey*, and given the inability of corporations to act except through their officers and agents, the supreme court in *Brown* has given a construction to the Worker's Compensation Act which is broad and liberal,[91] sensible[92] and reasonable.[93]

III. AVERAGE WEEKLY WAGE

In 1979 the Mississippi Supreme Court considered the question of whether wages from concurrently held employments should be included in the computation of the average weekly wage for awards under the worker's compensation statutes.[94]

In *Sullivan v. City of Okolona*,[95] a volunteer fireman who was injured while fighting a fire for the City of Okolona, suffered twenty-five percent disability.[96] Sullivan had earned thirty-five dollars in his capacity as volunteer fireman during the year preceding his injury. Additionally, he was employed as a presser at a local factory earning an average weekly wage of two hundred dollars.[97]

After several hearings, an administrative judge found that Sullivan was injured in the course and scope of his employment, and that he was entitled to compensation for twenty-five percent permanent partial disability.[98] The administrative judge determined that Sullivan's average weekly wage was three dollars and ninety cents per week and awarded him sixty-five cents per week. Sullivan appealed to the Full Workmen's Compensation Commission, which affirmed the order of the administrative judge except as to the permanent partial disability award of sixty-five cents per week. The Full Commission, relying upon its broad equitable powers to arrive at a fair result, remanded the case to the administrative judge for recomputation of benefits based upon the determination of the reasonable weekly wage of a fireman in the claimant's locale.[99] Sullivan's employer and his insurance carrier appealed the Full Commission's order to the Circuit Court of Chickasaw County, which reversed the Full Commission's order and reinstated the order of the administrative judge. From that decision Sullivan appealed to the Mississippi Supreme Court.[100]

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[90] Comment, *supra* note 35, at 108.

[91] *See* Dixie Contractors, Inc. v. Ashmore, 349 So. 2d 532, 535 (Miss. 1977) (courts must construe worker's compensation law broadly and liberally); Gray v. Poloron Prods., 347 So. 2d 363, 365 (Miss. 1977) (to give a broad and liberal interpretation to worker's compensation laws, doubtful cases should be resolved in favor of compensation).

[92] *See* Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 683, 52 So. 2d 634, 638 (1951) (construction of act must be sensible as well as liberal); Lucedale Veneer Co. v. Rogers, 211 Miss. 613, 622, 48 So. 2d 148, 150 (1950) (same).

[93] *Accord*, McCluskey v. Thompson, 363 So. 2d 256, 259 (Miss. 1978) (citing Brady v. John Hancock Mut. Life Ins. Co., 342 So. 2d 295, 298 (Miss.) *appeal dismissed*, 434 U.S. 804 (1977) (legislative intent must be ascertained by viewing the purposes of the act as a whole)); Mississippi Pub. Serv. Comm'n v. City of Jackson, 328 So. 2d 656, 658 (Miss. 1976) (same); McCaffrey's Food Mkt., Inc. v. Mississippi Milk Comm'n, 227 So. 2d 459, 463 (Miss. 1969) (same); *see* Sanders v. B.E. Walker Constr. Co., 251 Miss. 352, 362, 169 So. 2d 803, 807 (1964) (reasonable construction must be given to wording of statute).

[94] Sullivan v. City of Okolona, 370 So. 2d 921, 922 (Miss. 1979).

[95] 370 So. 2d 921 (Miss. 1979).

[96] *Id.*

[97] *Id.* at 922.

The Mississippi Supreme Court in *Sullivan v. City of Okolona*[101] affirmed the judgment of the circuit court and held that under section 71-3-31[102] of the Mississippi Code, the proper

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[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] 370 So. 2d 921 (Miss. 1979).

[102] MISS. CODE ANN. § 71-3-31 (1972) incorporates three methods of computing an employee's average weekly wage:

> [1] The basis for compensation . . . shall be the average weekly wages earned . . . in the employment in which [the employee] was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by fifty-two; but if the injured employee lost more than seven days during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.
>
> [2] When the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results just and fair to both parties will thereby be obtained.
>
> [3] Where, by reason of the shortness of time during which the employee has been [employed] . . . it is impracticable to . . . [use] . . . the above method, . . . regard shall be had to the average weekly amount which, during the first fifty-two (52) weeks prior to the injury or death, was being earned by a person in the same grade, employed at the same or similar work in the community

method for determining Sullivan's average weekly wage was to divide his total wage of thirty-five dollars by nine, the number of weeks or parts thereof that he had worked.[103] The court rejected Sullivan's contention that the determination of his average weekly wage should include both his wages as a volunteer fireman and those of his regular employment,[104] interpreting the statute[105] to require that the determination be made solely with reference to the wages earned in the employment giving rise to the injury.[106]

Regarding the question of whether wages from concurrently held employments should be included in the computation of the average weekly wage, three views have emerged. Though the majority of states allows the several wages to be combined only if the concurrent employments are similar or related, an increasing minority allows the combination of wages regardless of their relatedness or similarity.[107] In holding that earnings from concurrent employments may never be combined in determining the injured party's average weekly wage, Mississippi joins the state of New Jersey in the extreme minority with regard to the concept of concurrent employment.[108]

The leading authority in the field of worker's compensation, Larson, in his treatise,[109] does not discuss the jurisprudence of the extreme minority position, but as to those jurisdictions requiring similarity or relatedness he states:

. . . .

[103] 370 So. 2d at 923. The court noted that the administrative judge had applied the third section of the statute, and the Full Commission had applied the exception to the third section when it reversed the administrative judge. The court, however, chose to apply the second part of the statute. *Id.* at 923-24.

[104] *Id.* at 924.

[105] Miss. Code Ann. § 71-3-31 (1972) provides in pertinent part: "[T]he basis for compensation under this chapter shall be the average weekly wages earned by the employee at the time of the injury, *such wages to be determined from the earnings of the injured employee in the employment in which he was working at the time of the injury* . . . ." (emphasis added).

[106] 370 So. 2d at 924.

[107] 2 A. Larson, *supra* note 15, § 60.31, at 401-05.

[108] *Id.* at 407-08. *See* Maver v. Dwelling Managers Co., 34 N.J. 440, 170 A.2d 35, 37-38 (1961) (combination only for joint employment, not for concurrent but independent employment).

[109] A. Larson, The Law of Workmen's Compensation (1976).

> The rule refusing to combine earnings from concurrent employments unless they are "similar" or "related" is unnecessary from the point of view of statutory construction, unsound as a matter of accomplishing the purpose of the legislation, inhumane from the point of view of the claimant, and logically absurd as to the distinctions on which it is based.[110]

As to statutory construction, Larson points out that the purpose of catch-all phrases like that contained in the portion of section 71-3-31[111] found applicable by the court in the present case,[112] is "to prevent unfairness . . . not . . . when prior tests cannot literally be applied . . . [but] when they cannot 'fairly' be applied."[113] The fear is that the combination of concurrent wages will result in possible unfairness to employers by exposing them to increased risks as self-insurers or to higher premiums if the insured has been characterized as a chimera.[114] Furthermore, the employer is in any event in a better position to offset the loss.[115]

It is noteworthy that, despite a marked similarity between the Mississippi Worker's Compensation Act and the Florida Worker's Compensation Act,[116] Florida for some time has allowed the combination of wages earned in concurrent employments when calculating the average weekly wage.[117] Since remedial legislation should be liberally construed, the Mississippi

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[110] 2 A. LARSON, *supra* note 15, § 60.31, at 410.

[111] MISS. CODE ANN. § 71-3-31 (1972).

[112] Sullivan v. City of Okolona, 370 So. 2d 921, 923-24 (Miss. 1979). *See* notes 101 and 102 *supra*.

[113] 2 A. LARSON, *supra* note 15, § 60.31, at 412.

[114] Comment, *Workmen's Compensation: Concurrent Employment and Determination of the "Average Weekly Wage,"* 24 S.C.L. REV. 226, 233 (1972) (harm to employer "is so remote and theoretical that it hardly seems to offset the very real injustice of relegating a disabled man accustomed to full earnings to a benefit level below that of destitution because of the circumstances that he happened to earn his living in two 'dissimilar' jobs"). *Id.*

[115] 2 A. LARSON, *supra* note 15, § 60.31, at 415-16.

[116] Trotter v. Litton Syss., Inc., 370 So. 2d 244, 247 (Miss. 1979) (the Florida compensation statutes are virtually identical with Mississippi's statutes).

[117] American Uniform & Rental Serv. v. Trainer, 262 So. 2d 193, 194 (Fla. 1972) ("The purpose of the Act is to compensate for loss of wage earning capacity due to work-connected injury. It is the capacity of the 'whole man' not the capacity of the part-time or full-time worker that is involved.").

Supreme Court should follow the better, more reasoned rule of allowing the inclusion of concurrent wages in the computation of the average weekly wage.

IV. Conclusion

In 1979 the Mississippi Supreme Court substantially strengthened the exclusivity provisions of Mississippi's Worker's Compensation Act. The court interpreted the statutory immunity given to employers to extend to the negligent actions of corporate officers acting on behalf of the corporation and within the scope of their authority.[118] Additionally, the court rejected the utilization of the dual capacity doctrine under Mississippi's Worker's Compensation Act.[119] The former interpretation was a logical extension of the Act, the latter was an unnecessary restriction upon the latitude of the Worker's Compensation Commission and the courts in accomplishing the equitable purposes of the Act.

The year also yielded one of the harshest and most unreasonable applications of the Act. In denying the inclusion of concurrent wages in the determination of the injured worker's average weekly wage,[120] Mississippi joined the position of the extreme minority of states, a position inhuman in its treatment of claimants and contrary to the spirit and purposes of the Act.

M. Wayne Jacobs

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[118] *See* notes 43 through 93 and accompanying text *supra.*

[119] *See* notes 10 through 42 and accompanying text *supra.*

[120] *See* notes 95 through 116 and accompanying text *supra.*

CIVIL PROCEDURE

SUPREME COURT DECISIONS

During its 1979 term, the Mississippi Supreme Court handed down thirty-three opinions bearing in one way or another upon civil procedure in the state's courts. Among the cases that did not promise an impact warranting textual treatment herein were decisions dealing with the issues of additur and remittitur,[1] damages,[2] judgments *non obstante veredicto* and peremptory instructions,[3] jurisdiction,[4] Mississippi's long-arm statute,[5] standing of foreign corporations,[6] pleadings,[7] equity,[8] sovereign immunity,[9] suggestion of diminution of trial record,[10] and attorney's fees.[11] In the five areas discussed below, however, the court's pronouncements during the past year are worthy of the trial practitioner's attention.

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[1] Mississippi Power Co. v. Russell, 377 So. 2d 595, 597 (Miss. 1979) (trial court's decision as to remittitur will be overturned only on showing of abuse of discretion); Toyota Motor Co. v. Sanford, 375 So. 2d 1036, 1038-39 (Miss. 1979) (additur reversed and jury verdict reinstated where verdict not so inadequate as to constitute miscarriage of justice); McNair Transp., Inc. v. Crosby, 375 So. 2d 985, 987 (Miss. 1979) (trial judge found to have abused discretion in ordering $20,000 additur to $35,000 verdict where special damages were less than $3,000).

[2] Fore v. Quave, 377 So. 2d 919, 921 (Miss. 1979) (zero damages may be awarded where plaintiff already adequately compensated); Huggins v. Huggins, 371 So. 2d 297, 298 (Miss. 1979) (jury verdict set aside and new trial on issue of damages ordered where verdict was against great weight of the evidence).

[3] Young v. Young, 371 So. 2d 859, 860-61 (Miss. 1979) (peremptory instruction as to liability should have been granted in absence of issue for jury to decide); Blackwell v. Dairymen, Inc., 369 So. 2d 511, 513 (Miss. 1979) (judgment notwithstanding the verdict reversed where evidence presented issue for jury).

[4] Bramlett v. Burgin, Misc. No. 965 (Miss. Aug. 22, 1979) (circuit and chancery courts have no jurisdiction to enjoin attorney disciplinary proceedings, over which Mississippi Supreme Court has exclusive jurisdiction).

[5] MISS. CODE ANN. § 13-3-57 (1972), *construed in* Mandel v. James Graham Brown Foundation, Inc., 375 So. 2d 1017, 1018-19 (Miss. 1979) (allegation of foreign corporation's commission of a tort in the state sufficient to establish long-arm jurisdiction).

[6] Honey Fluff Donut Co. v. Daniel, Inc., 374 So. 2d 800, 801-02 (Miss. 1979) (foreign corporation need only be qualified to do business in state at time cause of action accrues to bring suit in Mississippi court); Cheatham v. Kem Mfg. Co., 372 So. 2d 1085, 1088-89 (Miss. 1979) (foreign corporation with sales representative and mail order business in state held not doing business in state so as to require registration).

[7] Townsend v. Warren, 373 So. 2d 811, 811-12 (Miss. 1979) (declaration alleging negligent damage of personal property held sufficient despite failure to allege existence of duty in defendant not to damage the property); West Center Apts., Ltd. v. Keyes, 371 So. 2d 854, 858 (Miss. 1979) (general prayer for relief is insufficient to authorize trial court's awarding of prejudgment interest); Tysons, Inc. v. Mississippi State Highway Comm'n, 367 So. 2d 939, 940-41 (Miss. 1979) (variance between Highway Commission's

I. PROCESS

Three 1979 cases dealt with the question of whether or not valid service of process had been made upon one or more defendants against whom judgments were taken at trial.[12] Of these decisions, *Mosby v. Gandy*[13] is of particular interest. In that case the complainants sought to set aside a decree ordering partition by sale of certain real property, alleging that valid process had not been obtained in the earlier suit because: (1) the allegations in the petition for partition as to the residence of the nonresident defendants had not been properly stated and were thus insufficient to support service of process by publication,[14] and (2) the averments in the petition claiming that the petitioners had made a diligent search and inquiry as to the nonresident defendants' post office and street addresses were false.[15] The

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pleadings and proof in eminent domain proceeding is fatal to its case).

[8] Cain v. Thomas, 373 So. 2d 812, 814 (Miss. 1979) (reaffirmation of "clean hands" doctrine).

[9] Jagnandan v. Mississippi State Univ., 373 So. 2d 252, 254 (Miss. 1979) (Mississippi State University is an arm of the state protected from liability by doctrine of sovereign immunity).

[10] Stewart v. State, 377 So. 2d 613, 613-14 (Miss. 1979) (suggestion of diminution of record overruled where case on appeal not prejudiced).

[11] Gulf S.S. Co.-Int'l Longshoremen's Ass'n Pension Plan and Agreement and Declaration of Trust v. Polk, 370 So. 2d 1348, 1351 (Miss. 1979) (disability pension claimant not entitled to attorney's fees under ERISA where cause of action arose prior to effective date of ERISA section authorizing same).

[12] Not discussed here are Delta Auction and Real Estate Co. v. Pirate's Inn Restaurant, Inc., 374 So. 2d 818, 820-21 (Miss. 1979) (default judgment against foreign corporation reversed where record did not reflect delivery of summons to a registered agent of corporation), and Varnado v. Dille, 373 So. 2d 1027, 1027-28 (Miss. 1979) (Mississippi suit on Louisiana judgment dismissed where proof of process in earlier suit did not satisfy Louisiana long-arm statute).

[13] 375 So. 2d 1024 (Miss. 1979).

[14] *Id.* at 1026. As to five of the six nonresident defendants, the petition alleged that the given defendant was "a nonresident of the State of Mississippi whose residence, post office and street address after diligent search and inquiry is known to your Petitioners only as General Delivery, Madison, Illinois." *Id.* at 1027.

[15] *Id.* at 1026.

defendants filed general demurrers to the bill; additionally, one defendant filed a motion to dismiss while another filed a special demurrer, each raising certain affirmative defenses.[16] No proof was offered on the motion; nonetheless, the chancellor sustained the demurrers and the motion, and dismissed the bill without explanation.[17]

On appeal, the Mississippi Supreme Court dealt with the complainants' first ground by testing the averments under section 13-3-19 of the Mississippi Code.[18] The court first recalled its previous rulings that the statute is jurisdictional and requires strict compliance.[19] However, the court ruled that in cases where the post office but not the street address is known, the conventional language, which generally consists of a statement of the post office address followed by the statement, "but the street address is unknown to complainant after diligent search and inquiry," is not indispensable.[20] The form used as to the five nonresident defendants whose street addresses were not known by the respondents in the instant case[21] was held to comply with the statute and to support service of process by publication.[22]

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[16] *Id.* The special demurrer raised the affirmative defenses of limitations of actions, laches, and bona fide purchaser for value, while the motion to dismiss set up res judicata, laches, and estoppel. *Id.* at 1029.

[17] *Id.* at 1026.

[18] Miss. Code Ann. § 13-3-19 (1972) provides that the post office address of the nonresident defendant shall be stated in the bill, petition, or affidavit, or it shall be stated that the post office address is not known to the complainant or petitioner after "diligent inquiry." It goes on to state that where the nonresident defendant's post office address is given, his street address shall also be given unless it be averred that such street address cannot be ascertained after "diligent search and inquiry."

While the court framed the issue as involving consideration of Miss. Code Ann. § 13-3-21 (1972) as well as § 13-3-19, 375 So. 2d at 1027, the former statute, which deals with the duties of the clerk in the service by publication procedure, is not actually pertinent to the question in the case and no construction of the section was in fact made by the court.

[19] 375 So. 2d at 1027. *See* McDuff v. McDuff, 252 Miss. 459, 463-64, 173 So. 2d 419, 420-21 (1965) (process held invalid where post office but not street address alleged); Rice v. McMullen, 207 Miss. 706, 725-26, 43 So. 2d 195, 200 (1949) (process by publication held insufficient where Texas post office address alleged but complainant failed to allege that defendant was nonresident of this state); Burns v. Burns, 133 Miss. 485, 490, 97 So. 814, 815 (1923) (process by publication held insufficient where complainant failed to allege defendant's post office address in his bill).

[20] 375 So. 2d at 1027.

[21] *See* note 14 *supra.*

Nevertheless, the complainants' allegation that the original petition had falsely alleged a diligent search and inquiry to ascertain the nonresident defendants' addresses[23] was less susceptible of easy disposition. After an extensive discussion of the well-settled rule that a defendant's actual knowledge of a suit does not overcome the infirmity of failure of process,[24] the court held that the complainants' allegation amounted to a charge that process in the partition suit had been secured by fraud. Such an allegation, it continued, was sufficient to withstand the general demurrers in the instant case.[25] The complainants were reminded, however, that on remand they would have to carry the burden of establishing fraud by clear and convincing evidence;[26] otherwise, they would be deemed bound by the partition decree.[27]

Finally, the court considered the special demurrer and motion to dismiss filed by the defendants and sustained by the chancellor below.[28] It recalled the rule that where a demurrer raises affirmative defenses, those defenses must be based on facts that either appear on the face of the bill of complaint or are unavoidable inferences therefrom.[29] Following the logic of a similar case which the court found to be "another among the cases which continue to come to this Court on demurrer when all the facts of the case ought to have been developed under answers,"[30] the court found that none of the facts upon which the special demurrer and motion to dismiss were based had been alleged in the bill of complaint and held that both should have been overruled.[31]

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[22] 375 So. 2d at 1027. As to the sixth nonresident defendant, the petition alleged that he was a nonresident of Mississippi whose residence, post office and street address were unknown to the petitioners after diligent search and inquiry. The statute was held to have been satisfied as to this defendant as well. *Id.*

[23] *See* note 15 and accompanying text *supra.*

[24] 375 So. 2d at 1027-28. *See, e.g.,* Rice v. McMullen, 207 Miss. 706, 727-28, 43 So. 2d 195, 200-01 (1949) (residuary legatee not estopped from attacking validity of decree setting aside will although he knew of earlier will contest but had not been validly served with process); McCoy v. Watson, 154 Miss. 307, 314-15, 122 So. 368, 370 (1929) (case in state court could not proceed where nonresident defendant had not been legally notified even though defendant appeared in state court to present a petition for removal to federal court).

[25] 375 So. 2d at 1028.

[26] *Id. See, e.g.,* Crawford v. Smith Bros. Lumber Co., 274 So. 2d 675, 677 (Miss. 1973) (action by timber purchaser against seller for fraud and deceit); Brewster v. Bubba Oustalet, Inc., 231 So. 2d 189, 189 (Miss. 1970) (suit for damages by buyer of automobile against automobile dealer); Mayfield Motor Co. v. Parker, 222 Miss. 152, 160, 75 So. 2d 435, 437 (1954) (action against automobile dealer to recoup damages resulting from alleged false representations concerning used automobile sold to plaintiff).

[27] 375 So. 2d at 1031.

[28] *Id.* at 1029-30. *See* note 16 and accompanying text *supra.*

The *Mosby* decision will no doubt be well-received by those practitioners whose readings of *Rice v. McMullen*[32] and *McDuff v. McDuff*[33] caused them to fear that the least departure from the boilerplate language[34] might render their bills insufficient to support process by publication. The case represents a laudable victory for substance over form.

II. EVIDENCE

Five cases decided by the court in 1979, three of which will receive textual treatment here,[35] dealt with various evidentiary problems in civil matters. In *State Farm Fire & Casualty Co. v.*

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[29] 375 So. 2d at 1029. *See, e.g.*, Greer v. Crawford Corp., 220 Miss. 97, 104-05, 70 So. 2d 67, 71 (1954) (facts forming basis of affirmative defenses must appear on face of bill); Taylor v. Twiner, 193 Miss. 410, 419, 9 So. 2d 644, 646 (1942) (same); V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 300, at 286 (2d ed. 1950) (statutes of limitation as affirmative defense may be raised by demurrer when facts forming basis of defense appear fully and distinctly on face of bill). The same rule applies to a motion to dismiss raising affirmative defenses when not supported by proof. 375 So. 2d at 1029.

[30] Taylor v. Twiner, 193 Miss. 410, 418, 9 So. 2d 644, 646 (1942), *quoted in* 375 So. 2d at 1030.

[31] 375 So. 2d at 1030.

[32] 207 Miss. 706, 725-26, 43 So. 2d 195, 200 (1949). *See* note 19 and accompanying text *supra*.

[33] 252 Miss. 459, 463-64, 173 So. 2d 419, 420-21 (1965). *See* note 19 and accompanying text *supra*.

[34] *See* text accompanying notes 19 and 20 *supra*.

[35] The two cases not treated in the text are Bourn v. Bourn, 375 So. 2d 421, 422-24 (Miss. 1979) (testimony of decedent's brother properly excluded under Dead Man's Statute, MISS. CODE ANN. § 13-1-7 (1972), in suit by brother to establish resulting trust against decedent's widow), and Pittman v. Mississippi Power and Light Co., 368 So. 2d 238, 239-40 (Miss. 1979) (admission of motion picture simulating accident in which decedent was killed held reversible error upon showing of material variations between simulation and actual event).

Magee,[36] the administratrix of the estate of a truck passenger killed in an automobile collision brought an action to recover under the uninsured motorist provision of her decedent's liability insurance policy. After a judgment for plaintiff,[37] the defendant, State Farm, appealed and cited as error, *inter alia,* (1) the trial court's admission of the testimony of the automobile driver's administrator that there was no liability insurance policy covering either the driver or the car at the time of the accident;[38] and (2) the admission of answers to interrogatories propounded to the automobile driver's widow, which were offered to prove the nonexistence of liability insurance covering the automobile driver.[39] The defendant's objection in both instances was that this evidence constituted hearsay.

The defendant cited *State Farm Mutual Automobile Insurance Co. v. Stewart*[40] as supporting its first argument. The court distinguished *Stewart,* however, as involving the testimony of the plaintiff's own attorney regarding his investigation, testimony of less probative value than that of the administrator of the decedent's estate.[41] Recognizing that an exception to the hearsay rule may be invoked where the hearsay evidence is the only possible proof,[42] the court held that the results of an investigation by an administrator of an estate to determine whether a liability insurance policy exists in the estate are admissible in a suit on an uninsured motorist provision, and that such testimony showing the nonexistence of a policy makes out a prima facie case for the plaintiff.[43]

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[36] 368 So. 2d 230 (Miss. 1979).

[37] *Id.* at 231. The jury returned a verdict for the plaintiff in the amount of $10,000. *Id.*

[38] *Id.* at 232. The automobile driver's administrator testified that he conducted an independent investigation to determine the estate's assets and that an insurance policy would constitute an asset of the estate. He further testified that his investigation revealed no insurance policy covering the defendant or his automobile. *Id.*

[39] *Id.* at 233. The automobile driver's widow, a nonresident who did not testify at trial, was asked if her husband had "any liability insurance at the time of the accident." Her response was, "no." *Id.* at 233.

Upon receipt of notice of the interrogatories the defendant moved to suppress them. The motion was overruled and defendant declined to propound cross-interrogatories. *Id.*

[40] 288 So. 2d 723, 724 (Miss. 1974) (testimony of plaintiff's attorney that his investigation disclosed that the motorist was uninsured constituted hearsay and was not admissible evidence).

[41] 368 So. 2d at 232.

[42] *E.g.*, Erion v. Timken Co., 52 Ohio App. 2d 123, 368 N.E.2d 312, 316-17 (1976) (hearsay admissible where other evidence practically nonexistent and admission serves interest of justice). *See* 3 B. JONES, COMMENTARIES ON EVIDENCE § 1195, at 2191 (2d ed. 1926) (where only evidence available is hearsay the necessity of receiving it surmounts its character; hardship is not a consideration); 29 AM. JUR. 2d *Evidence* § 496, at 554 (1967)

The court dismissed rather summarily the defendant's attack on the admission of the interrogatories, observing simply that the plaintiff had propounded the interrogatories in full compliance with section 13-1-35[44] of the Mississippi Code and that section 13-1-47[45] provides that such interrogatories are admissible evidence.[46]

The distinction drawn by the *Magee* court between the testimony of the plaintiff's attorney and that of the administrator of the uninsured motorist's estate[47] is a pertinent one, especially when the presumably disinterested viewpoint of the administrator is contrasted with the necessarily biased view of the plaintiff's attorney. However, the appearance that the decision is based substantially on a hearsay exception existing where the hearsay evidence is the only proof available[48] is belied by the presence in the record of the answers by the decedent's widow to interrogatories inquiring as to the existence of a liability insurance policy.[49] Thus, while the case was properly decided, the decision's foundation is not wholly clear.

A second 1979 case in the evidence area involved a challenge to admissibility based upon pretrial procedure. In *Clark v. Mis-*

("necessity" does not uniformly require total inaccessibility; a showing of great practical inconvenience is sufficient). *But see* Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 296 (1813) (rule that death of eyewitness justifies admission of hearsay would be dangerous).

[43] 368 So. 2d at 232.

[44] MISS. CODE ANN. § 13-1-35 (repealed 1975) set out the procedure for propounding interrogatories to nonresident witnesses.

[45] *Id.* § 13-1-47 (repealed 1975) provided for the admission into evidence of depositions and interrogatories taken, certified, and returned pursuant to the law.

Sections 13-1-35 and 13-1-47 were among those sections which were repealed and replaced by the new Mississippi rules of discovery enacted in 1975. 1975 Miss. Laws ch. 501 (codified at MISS. CODE ANN. §§ 13-1-201, 13-1-226 to -237, 13-1-241 to -243 (Supp. 1979)).

[46] 368 So. 2d at 233.

[47] *See* note 41 and accompanying text *supra.*

[48] *See* note 42 and accompanying text *supra.*

[49] *See* note 39 and accompanying text *supra.*

sissippi Power Co.,[50] the plaintiff brought a suit based on negligence to recover for injuries he had suffered upon contact with one of the defendant's power lines.[51] After a jury verdict for the defendant, the plaintiff, on appeal, set out as his sole assignment of error that the trial court had erred in sustaining the defendant's objection to the admission of the testimony of the plaintiff's expert electrical engineer.[52] The objection had been sustained on the basis of the plaintiff's failure to answer the defendant's interrogatories concerning the nature and source of the standard of care allegedly violated by the defendant, protective devices which allegedly should have been maintained by the defendant, and the identity of any expert witnesses whom the plaintiff expected to call and the subject matter of such experts' testimony.[53]

Noting first that the interrogatory concerning the plaintiff's experts was fully authorized by section 13-1-226(b)(4)(A)(i)[54] of the Mississippi Code, the supreme court stated that while caution should be the rule in excluding testimony such as that involved in the instant case, the trial court is given broad discretion in matters of discovery and evidence developed therefrom.[55]

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[50] 372 So. 2d 1077 (Miss. 1979).

[51] *Id.* at 1078. The appliance plaintiff was using to attach a sign to an outdoor billboard came in contact with an electrically charged line owned and operated by the defendant. Plaintiff charged defendant with negligently locating, operating, and maintaining the line and for negligently failing to insulate the line properly. *Id.*

[52] *Id.*

[53] The plaintiff originally responded that he did not have the information to answer the interrogatories at that time, but would file supplemental answers at a later date. He failed to do so. About three months after the original answers were filed, defendant filed a demand to plaintiff to supplement answers. Plaintiff again failed to supply answers. *Id.* at 1079-80. However, the plaintiff's attorney did orally advise the defense attorney of his expert's name and address six weeks prior to the trial. *Id.* at 1080.

[54] MISS. CODE ANN. § 13-1-226(b)(4)(A)(i) (Supp. 1979) provides:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

[55] 372 So. 2d at 1080. *See* Harkins v. Paschall, 348 So. 2d 1019, 1022 (Miss. 1977) (trial court's holding inadmissible interrogatories which were evasive and unresponsive was not an abuse of the broad discretion given it); Paulk v. Housing Auth., 228 So. 2d 871, 873 (Miss. 1969) (trial court's order sustaining a motion to suppress interrogatories will not be disturbed in the absence of an abuse of its considerable discretion in discov-

The court found that the exercise of that discretion had not been abused in the instant case, the plaintiff having failed to comply substantially with the requirements of the discovery statutes.[56]

The plaintiff also argued that the statutory authorization of the court "on motion" to impose certain sanctions, such as the exclusion of evidence, upon a party failing to respond to interrogatories[57] requires the filing of a written motion rather than the mere making of an oral objection as was done by the defendant at trial.[58] Upon examining the statute and its purpose, the court found that the words "on motion" contemplated an oral objection at trial as well as a written motion. The judgment for the defendant was affirmed.[59]

The court's decision is consistent with the rule prevailing in the vast majority of jurisdictions authorizing the exclusion of the testimony by a witness whose identity has been withheld deliberately in discovery.[60] Indeed, exclusion is mandatory in some jurisdictions,[61] although an exception is recognized in cases

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ery matters); 23 AM. JUR. 2d *Depositions and Discovery* § 149, at 482-83 (1965) (same).

[56] 372 So. 2d at 1080. The court suggested that if answers to interrogatories concerning standard of care and protective devices had been given, there would have been substantial compliance with the statutes, even though an answer to the interrogatories regarding any expert witnesses the plaintiff expected to call was not provided. *Id. See* note 53 and accompanying text *supra*.

[57] MISS. CODE ANN. § 13-1-237(d) (Supp. 1979) provides in part: "If a party . . . fails . . . to serve answers or objections to interrogatories . . ., after proper service of the interrogatories . . ., the court in which the action is pending on motion may make such orders in regard to the failure as are just. . . ."

[58] 372 So. 2d at 1080. Defendant relied on the provisions set forth in MISS. CODE ANN. § 13-1-237 (Supp. 1979) to support his contention. 372 So. 2d at 1080.

[59] 372 So. 2d at 1080-81. The court's holding was primarily based on section (d) and subsection (b)(2)(B) of the statute authorizing the court to issue "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, *or prohibiting him from introducing designated matters in evidence.*" *Id.* at 1081 (emphasis by the court).

[60] *See, e.g.*, Newsum v. Pennsylvania R.R., 97 F. Supp. 500, 502 (S.D.N.Y. 1951) (intentional withholding of names of important witnesses warrants exclusion of their testimony); Sather v. Lindahl, 43 Wash. 2d 463, 261 P.2d 682, 682-83 (1953) (trial judge may refuse to permit testimony by undisclosed witness upon objection of surprised party); 23 AM. JUR. 2d *Depositions and Discovery* § 265, at 660 (1965). *See generally* Annot., 27 A.L.R.2d 737 (1953).

[61] *E.g.*, Ceco Steel Prods. Corp. v. H.K. Porter Co., 31 F.R.D. 142, 144 (N.D. Ill. 1962) (testimony of witnesses whose identity is deliberately withheld in discovery may

where the noncompliance is the result of neglect rather than design.[62] It is clear from both the statute[63] and the court's language in *Clark*[64] that the Mississippi rule gives the courts considerable flexibility in levying sanctions. This flexible approach seems the most practical. While enforcement of sanctions is necessary to assure good faith efforts to comply with the discovery rules, the courts should be free to admit the testimony in question where there has been substantial compliance[65] and no prejudice to the objecting party.

The third 1979 decision concerning an evidentiary question of interest was *Mizell v. Black.*[66] In that case, the complainant's bill alleged ownership of a tract of land by adverse possession as the result of certain acts performed by her and her deceased husband.[67] After the chancellor found for the defendant, the complainant appealed and cited as error: (1) the chancellor's invocation of the Dead Man's Statute[68] to exclude the complainant's testimony as to the acts of adverse possession performed by her husband, and (2) the chancellor's consideration of the final decrees in earlier confirmation suits by the record title holders, of which suits the complainant had no notice.[69]

The court found both assignments of error to be well-taken. Reading from the Dead Man's Statute, the court observed that a person is prohibited from testifying "to establish his own claim

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not be introduced); Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 163 A.2d 465, 480 (1960) (exclusion is penalty for failure to name witness in answer to interrogatory).

[62] *E.g.,* Smith v. Potomac Elec. Power Co., 236 Md. 51, 202 A.2d 604, 610 (1964) (exclusion not mandatory, but permissible, where failure to disclose is not willful); Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 163 A.2d 465, 480 (1960) (in the absence of prejudice rule may be relaxed in cases of excusable neglect or misunderstanding).

[63] *See* note 59 and accompanying text *supra.*

[64] The court's opinion concludes with the declaration that "in problems as here presented questions should be decided on a case by case basis." 372 So. 2d at 1081.

[65] *See* note 56 and accompanying text *supra.*

[66] 369 So. 2d 755 (Miss. 1979).

[67] *Id.* at 756. Complainant offered testimony that her husband had fenced the land in question, posted it according to the law, and used it as pasture land. Defendant objected to her testimony on the grounds that it was prohibited by MISS. CODE ANN. § 13-1-7 (1972) (Dead Man's Statute). 369 So. 2d at 756.

[68] MISS. CODE ANN. § 13-1-7 (1972).

[69] 369 So. 2d at 755.

or defense *against* the estate of a deceased person, which originated during the lifetime of such deceased person. . . ."[70] The complainant in the instant case was not seeking to establish a claim against her husband's estate; rather, as its sole heir, she was attempting to establish a claim on behalf of the estate and should have been permitted to testify to that end.[71] The second assignment was sustained without citation of authority. The court reasoned that since the complainant had known nothing of the earlier confirmation suits, any consideration by the chancellor in the instant case of those decrees was error.[72] The case was reversed and remanded for a new trial in which the complainant's excluded testimony was to be heard.[73]

Here again, the Mississippi court is in line with the general rule, which permits a widow's testimony as to her deceased husband's acts where the adverse party is not an administrator, executor, or other representative of her husband's estate.[74] At least one jurisdiction allows the widow to testify against even a representative of the estate.[75] The reasoning of the court in *Mizell* is difficult to criticize. Since the object of the Dead Man's Statute is simply to prevent the living from testifying against the dead,[76] there appears to be no reason for barring the living from testifying against the living to establish a claim through the dead.

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[70] *Id.* at 756 (court's emphasis) (quoting Miss. Code Ann. § 13-1-7 (1972)).

[71] 369 So. 2d at 756-57. *Accord,* Houser v. Houser, 251 Miss. 209, 217-18, 168 So. 2d 801, 804 (1964) (administratrix of husband's estate permitted to testify as to her father-in-law's execution of a deed to her husband).

[72] 369 So. 2d at 757. The parties to the earlier confirmation suits did not publish any notice of the pending litigation nor was there any proof that complainants had notice of those suits. *Id.*

[73] *Id.*

[74] *See, e.g.,* Trabin v. Title Ins. & Trust Co., 52 Cal. 2d 149, 339 P.2d 136, 137-38 (1959) (widow who was co-defendant with husband's executors in suit on contract was competent to testify); Williams v. Campbell, 84 Kan. 46, 113 P. 800, 801 (1911) (in suit against defendants who were neither representatives nor heirs at law widow could testify as to communications with her deceased husband); Forbstein v. General Tire Co., 167 Md. 686, 175 A. 445, 446 (1934) (widow competent to testify against injured plaintiffs as to automobile collision in which deceased husband was driving the car); Spencer v. Smith, 128 S.W.2d 315, 318 (Mo. Ct. App. 1939) (widow of deceased lessee competent to testify against sublessee seeking to reform sublease); Smith v. Smith, 52 N.J.L. 207, 19 A. 255, 256 (1890) (widow was competent to testify as to her marriage to deceased husband against devisees who were not his legal representatives); Ellison v. Strandback, 62 N.W.2d 95, 98-99 (N.D. 1953) (widow competent to testify as to husband's adverse possession of property she claimed as his heir at law). *See generally* 97 C.J.S. *Witnesses* § 157, at 600-01 (1957).

[75] *See In re* Estate of Carnevalino, 435 Pa. 366, 257 A.2d 546, 547-48 (1969) (widow competent to testify in executor's suit to recover bond and purchase money mortgage she claimed).

III. APPEALS

Two of the three[77] 1979 decisions involving appellate procedures merit textual attention. Timeliness and the steps required to perfect an appeal were at issue in *Allgood v. Allgood.*[78] In that case, the chancellor entered his final decree on July 27, 1978. The attorney for the appellant filed a notice to transcribe the record with the court reporter on August 2, and the appeal bond was paid six days later. The chancery clerk's cost bill was entered and paid on October 3, 1978.[79]

Until 1978, the filing of the appeal bond within the forty-five day appeal period[80] was sufficient to perfect the appeal.[81] The 1978 legislature, however, amended the statutes governing the appeals procedure to require, *inter alia,* the prepayment of costs in the court below as well as the fifty dollar filing fee[82] in order to perfect the appeal.[83] Since the appellant in the instant

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[76] *See* Poole v. McCarty, 240 Miss. 341, 348, 127 So. 2d 398, 401 (1961) (in an action to reform a contract, Dead Man's Statute did not disqualify as a witness one of the parties to the contract where the other party had conveyed a small portion to another who was deceased at the time of the trial).

[77] For another 1979 decision dealing with appeal and error, see Bowman v. Rutledge, 369 So. 2d 768, 769 (Miss. 1979) (pursuant to state statute, granting of new trial on all issues is an interlocutory order from which appeal is untimely).

[78] 367 So. 2d 450 (Miss. 1979) (en banc).

[79] *Id.* at 450.

[80] MISS. CODE ANN. § 11-51-5 (Supp. 1979).

[81] *Id.* § 11-51-25 (1972) (amended 1978).

[82] The filing fee is established by *Id.* § 25-7-3 (Supp. 1979).

[83] 1978 Miss. Laws ch. 335 (codified at MISS. CODE ANN. §§ 11-1-21; 11-3-5, -23, -33, -41 to -45; 11-27-29, -37; 11-51-7, -11, -15, -21, -25 to -39, -45, -47, -51, -53, -61, -69 to -73, -99, -105 to -109; 13-3-121; 25-7-3; 99-35-105 to -109, -121 (Supp. 1979)). *See generally* Abbott, *The Proposed Mississippi Rules of Civil Procedure—An Argument for Adoption,* 49 MISS. L.J. 285, 285, 297-98 (1978) (promulgation of appeals procedure in Mississippi).

Where an appeal is not sought by petition, MISS. CODE ANN. § 11-51-25 (Supp. 1979) now provides:

> [i]t shall be considered to have been taken when the costs in the lower court and the fee required by section 25-7-3 were paid to the clerk of the lower court

case did not prepay costs or the filing fee until October 3, 1978, he did not perfect his appeal within the required forty-five days from final judgment.[84] Following prior law, which established that failure to file a timely appeal bond deprived the court of jurisdiction,[85] the court held that the new requirements were also jurisdictional and that failure to comply with them justified dismissal of the appeal.[86]

However, the court also noted that: (1) the new statutory scheme had gone into effect only shortly before the final judgment below was rendered;[87] (2) the appellant had made a good faith effort to perfect his appeal properly under the former procedure; and (3) he was not presented with a timely bill of costs as called for by the amended procedure.[88] Under those circumstances, the court found dismissal to be unwarranted.[89] How-

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> or from the time of filing the transcript of record in the office of the clerk of the supreme court.

The *Allgood* court reasoned that "it appears that the legislative intent was to require prepayment of costs as the means to perfect an appeal," 367 So. 2d at 451, despite the language in § 11-51-25 suggesting the filing of the transcript of record as an alternative. The *Allgood* opinion gives no indication that the appellant filed the transcript within the forty-five day period. *See generally* Allen & Taylor, *Appeals to the Mississippi Supreme Court,* 48 Miss. L.J. 505, 536-40 (1977) (statutory methods of appeal).

[84] 367 So. 2d at 451.

[85] Kennedy v. Gervais, 345 So. 2d 1039, 1039 (Miss. 1977); Fisher v. Crowe, 289 So. 2d 921, 924 (Miss. 1974).

[86] 367 So. 2d at 451. Timely compliance with procedural requirements governing appeals is generally deemed essential to appellate court jurisdiction. *See, e.g.,* Lynch v. Holmstrand, 69 Cal. App. 2d 51, 158 P.2d 250, 252 (Dist. Ct. App. 1945) (failure to file appeal within time allotted by rules deprives court of jurisdiction); Baxter v. Long, 122 Ga. App. 500, 177 S.E.2d 712, 713 (1970) (provisions of appellate practice statutes are mandatory and failure to comply necessitates dismissal). *See generally* F. James & G. Hazard, Civil Procedure § 13.7 (2d ed. 1977) (element of timeliness is usually strictly required); 5 C.J.S. *Appeal and Error* § 1357 (1958) (same).

[87] The new statutes became effective July 1, 1978, while the chancellor's final decree in the instant case was filed July 27. It is questionable whether the legislature would have approved of the court's leniency with the *Allgood* appellant on this ground; rather, the act provided that while it would not apply to any case in which a petition for appeal had been filed prior to July 1, 1978, its provisions would govern "all other cases then pending and hereafter filed." 1978 Miss. Laws ch. 335, § 40 (codified at Miss. Code Ann. §§ 11-1-21, 11-27-29, 11-51-7, 25-7-3, 99-35-105 (Supp. 1979)).

[88] Miss. Code Ann. § 11-51-61 (Supp. 1979) requires the trial court clerk to compile, certify, and record in the trial record a complete cost bill within five days of the rendering of a final judgment or decree.

[89] 367 So. 2d at 451-52. As precedent for its leniency with the appellant the court cited Sabougla Drainage Dist. No. 2 v. People's Bank & Trust Co., 191 Miss. 331, 341, 1

ever, it further held that, in the future, if the clerk of the trial court fails to carry out his duty to present the bill of costs,[90] the appellant will be charged with the duty of making a written motion to the trial court within the forty-five day appeal period to compel the clerk's production of the bill.[91]

The court's exercise of discretion in *Allgood* appears commendable at first glance, since the ends of justice would not be served by the dismissal of an appeal for untimeliness if the trial court clerk's delinquency were largely responsible for the delay. Theoretical problems are created, however, by the court's suspension in the same breath of a rule that it has held to be jurisdictional. Nevertheless, the court's placing the burden to act affirmatively upon the appellant should minimize such problems. Those that do arise will have to be decided by strict statutory construction if the court is actually to give the new rules jurisdictional effect.

The year's other decision of note dealing with the appeals process was *State ex rel. Moak v. Moore*.[92] The plaintiffs in that case brought an action in tort arising out of an alleged defect in a bridge. All named defendants except Burt, a county engineer,

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So. 2d 219, 221 (1941), in which the court relied upon MISS. CODE ANN. § 3382 (1930) (current version at MISS. CODE ANN. § 11-3-13 (1972)) to condone an appellant's failure to file the trial record by the return day of the appeal where such failure was not the result of the appellant's neglect.

While there is no analogous statutory grant of discretion to the court applicable in the *Allgood* situation, appellate courts generally do exercise some degree of discretion where the ground on which the motion to dismiss is based on something other than jurisdiction. *See, e.g.,* Price v. Brodrick, 183 Kan. 71, 325 P.2d 387, 388-89 (1958) (court favors appeals and will not dismiss them for breach of procedural rules absent showing of prejudice to other side); Baer v. Amos J. Walker, Inc., 85 Nev. 219, 452 P.2d 916, 917 (1969) (appellate court has discretion to overlook breach of its procedural rules); State v. Brunswick, 69 Ohio App. 407, 91 N.E.2d 553, 557 (1949) (statutory requirement that brief be filed with transcript not jurisdictional; appellate court had discretion to allow appeal). *See generally* 5 AM. JUR. 2d *Appeal and Error* § 906 (1962) (judicial policy encourages hearings on the merits); 5 C.J.S. *Appeal and Error* § 1357 (1958) (same). It must be remembered, however, that the *Allgood* court stated that the requirements therein involved were jurisdictional. *See* notes 85, 86 and accompanying text *supra*.

[90] *See* note 88 *supra*.

[91] 367 So. 2d at 452. *E.g.,* Oswalt v. Austin, 192 Miss. 653, 656, 6 So. 2d 924, 924 (1942) (directed clerk to file transcript by applying for writ of certiorari).

[92] 373 So. 2d 1011 (Miss. 1979) (en banc).

were served with process or otherwise entered an appearance.[93] All defendants except Burt successfully demurred to the plaintiff's declaration.[94] Accordingly, all defendants supported their motion to dismiss the appeal by arguing that since the lower court had entered no order as to Burt, a named defendant, the judgment below was interlocutory rather than final and hence not appealable.[95] Cited by the defendants was the rule that a judgment is not final until the case is settled as to all parties.[96]

The court, however, held that since he had not been served with process, Burt was not a party to the suit despite having been named in the declaration.[97] While the court acknowledged that an action cannot proceed to an appeal where an indispensable party has not been properly joined,[98] it held that Burt was neither a necessary nor an indispensable party and that the failure to enter an order as to him did not render the judgment below interlocutory.[99] The motion to dismiss the appeal was overruled.[100]

The court's decision in *Moore* is undoubtedly sound. To have held otherwise would have been to allow a failure to serve a named defendant with process to be seized upon by a party defendant, whose rights and liabilities are wholly independent, for the purpose of delaying or avoiding a proper adjudication of the plaintiff's claims against him.

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[93] *Id.* at 1012. A summons was issued for Burt. *Id.*

[94] *Id.*

[95] *Id.* Miss. Code Ann. § 11-51-3 (1972) authorizes appeals only from final judgments or decrees.

[96] 373 So. 2d at 1012. *See* Cotton v. Veterans Cab Co., 344 So. 2d 730, 731 (Miss. 1977) (judgment settling cause only as to some defendants is not final); Southern Saw & Motor Distrib. Inc. v. Dolmar N. Am. Corp., 317 So. 2d 400, 401 (Miss. 1975) (same); Bradley v. Holmes, 242 Miss. 247, 253, 134 So. 2d 494, 496 (1961) (same).

[97] 373 So. 2d at 1013.

[98] Robbins v. Berry, 209 Miss. 422, 426-27, 47 So. 2d 846, 848 (1950) (in suit to cancel an oil lease, oil lessee was indispensable party without whom case could not proceed).

[99] 373 So. 2d at 1013. It is generally agreed that a person who does not either receive service of process or enter an appearance and who is not affected by the outcome of the litigation is not a necessary party to the appeal. *See, e.g.*, Clay v. Smith, 208 Ga. 423, 67 S.E.2d 235, 236 (1951) (person named in petition but who was not served, did not waive service, and was not affected by judgment was not necessary party to appeal); Stillabower v. Foster, 222 N.E.2d 292, 295 (Ind. 1966) (one not a necessary party who was not served with process and was not a party at trial or on appeal); Halstead v. Olsen, 97 N.W. 442, 443 (Neb. 1903) (parties who disclaimed ownership in possessory action were not necessary parties to appeal).

[100] 373 So. 2d at 1013.

IV. DEFAULT

Two 1979 decisions[101] of the Mississippi Supreme Court dealt with the ramifications of a defendant's default at the trial or appellate level. Default on appeal was the source of debate in *Ramsey v. Ramsey.*[102] In that case a suit filed by an elderly woman to set aside a deed she had executed to her nephew was dismissed by the chancellor after a full trial.[103]

On appeal to the supreme court, the appellant moved to have the appeal taken as confessed or to set the matter for oral argument if the appellee failed to file a responsive brief.[104] After hearing oral argument from the appellant alone, the court first affirmed the chancellor without opinion, then granted the appellant's petition for rehearing.[105]

In its opinion following rehearing, the court cited *W.T. Raleigh Co. v. Armstrong,*[106] in which it had set out two categories of cases involving default on appeal and the courses open to the court in each situation.[107] The instant case was found to fall into

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[101] Not discussed in the text is Moseley v. Southern Colonel Mobile Homes, Inc., 375 So. 2d 407, 409-12 (Miss. 1979) (injunction of execution of default judgment dissolved where there was no evidence of fraud, accident, or wrongful act by plaintiff; defendant's negligence was the cause of its default; and defendant failed to allege and prove a meritorious defense).

[102] 377 So. 2d 621 (Miss. 1979).

[103] *Id.*

[104] The appellee's brief was due on December 11, 1978; it still had not been filed when appellant filed her motion on February 2, 1979. *Id.*

[105] The court granted the rehearing after neither the appellee nor his counsel responded to letters addressed to them by the court. *Id.* at 621-22.

[106] 165 Miss. 380, 140 So. 527 (1932).

[107] *Id.* at 382, 140 So. at 527-28. The two situations identified by the *Armstrong* court were as follows:

> (1) When the record is complicated or of large volume, and the case has been thoroughly briefed by appellant with a clear statement of the facts, and with apt and applicable citations of authorities, so that the brief makes out an apparent case of error, we will not regard ourselves as obliged to look to the record or to search through it to find something by which to avoid the force of appellant's presentation, but will accept appellant's brief as confessed and will reverse. Or (2) when the record is in such condition that we can conveniently

the first *Armstrong* category,[108] and the appellant was held to have made out an apparent case for the existence of a confidential relationship between the two parties. The record reflected no proof for the appellee as to the appellant's having received independent, disinterested advice or having voluntarily and knowingly executed the deed. The court thus reversed the chancellor and cancelled the deed.[109]

An examination of the analytical process by which the *Ramsey* court reached its decision reveals that it did not in fact follow the *Armstrong* rule. Rather than refusing to search the record on the appellee's behalf and taking the appellant's brief as confessed, as the first *Armstrong* course would dictate,[110] the court reported that its decision was reached only after it had made "a careful review of the whole record."[111] Nor can the court's approach be said to fit the mold of the second *Armstrong* course, which, while prescribing a review of the record, gives the court the alternatives of either affirming the lower court or reversing it without prejudice.[112] The apparent justice of the court's resolution of the controversy notwithstanding, the *Ramsey* opinion serves only to muddy the waters as to the effect that an appellee's default will have upon the court's treatment of the case.

V. REPLEVIN

Mississippi's new replevin statutes, enacted by the legisla-

> examine it, and when upon such an examination we can readily perceive a sound and unmistakable basis or ground upon which the judgment may be safely affirmed, we will take that course and affirm, thereby to that extent disregarding the default of appellee. But when, taking into view the argument presented by appellant, the basis or grounds of the judgment, and the facts in support of it are not apparent, or are not such that the court could with entire confidence and safety proceed to affirmance, the judgment will be reversed without prejudice.

Id., 140 So. at 527-28.

[108] 377 So. 2d at 622. *See* note 106 *supra.*

[109] 377 So. 2d at 622-23.

[110] *See* note 107 *supra.*

[111] 377 So. 2d at 622.

[112] *See* note 107 *supra.*

ture in 1975,[113] were the subject of two supreme court decisions of the past year.[114] In *Finance America Private Brands, Inc. v. Durbin,*[115] the plaintiff's declaration in replevin was met by a counterclaim in the defendant's answer.[116] After the trial judge submitted to the jury both the issue of possession of the property and that of the defendant's damages, a verdict awarding damages to the defendant was returned. The plaintiff moved for a judgment *non obstante veredicto* or a new trial; the court granted a new trial on the issue of damages only.[117] To the plaintiff's argument on direct appeal that the trial court erred in submitting to the jury the issue of defendant's damages prior to the resolution of the possession issue in defendant's favor, the defendant responded that plaintiff had no standing to appeal from the trial court's grant of a new trial on the issue of damages.[118]

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[113] 1975 Miss. Laws ch. 508 (codified at MISS. CODE ANN. §§ 11-37-101 to -157 (Supp. 1979)).

[114] There is no textual discussion of Birdsong v. Trans-American Van Serv., Inc., 369 So. 2d 751, 753-54 (Miss. 1979) (fact that declaration failed to set out value of each separate article involved required reversal of judgment for plaintiff and remand for amendment of pleadings).

[115] 370 So. 2d 1356 (Miss. 1979).

[116] The plaintiff alleged that the defendant was indebted to him under the terms of a security agreement, which entitled the plaintiff to possession of certain personal property upon default. The defendant denied that he was in default and counterclaimed for financial loss, embarrassment, and destruction of credit. *Id.* at 1356-57.

[117] *Id.* at 1357.

[118] *Id.* The defendant cited MISS. CODE ANN. § 11-7-213 (1972), which provides:

> Every new trial granted shall be on such terms as the court shall direct; and no more than two new trials shall be granted to the same party in any cause. Provided, however, that when the sole ground for a new trial is the excessiveness or inadequacy of damages assessed, the party aggrieved may elect to appeal from the order granting a new trial.

The second part of § 11-7-213 creates some confusion in the context of the instant case, since it appears to authorize specifically the plaintiff's appeal. However, while the plaintiff in the instant case was no doubt "aggrieved" by the trial court's disposition of the case, decisions construing the statute make clear that the "aggrieved party" to whom the statute refers is the one who opposed the motion for a new trial. *See, e.g.,* City of Meridian v. Dickson, 266 So. 2d 143, 144 (Miss. 1972) (defendant appealing order of new trial for inadequacy of damages is asking that the judgment be reinstated); Friendly Fin. Co. v. Mallett, 243 So. 2d 403, 407 (Miss. 1971) (plaintiff's appeal from order granting new trial on excessiveness of damages permissible).

The defendant also cross-appealed, contending that the trial judge's award of a new trial on the issue of damages was an abuse of his discretion since the damages awarded by the jury were not excessive. The court's reversal of the case on the plaintiff's appeal precluded its reaching this issue. 370 So. 2d at 1357.

Citing sections 11-37-127 and 11-37-129 of the Mississippi Code,[119] the supreme court agreed with the plaintiff that the trial court's simultaneous submission to the jury of the issues of possession and damages was error.[120] The court clarified language in *General Motors Acceptance Corp. v. Fairley,*[121] which seemed to authorize a replevin defendant's filing of a counterclaim or request of recoupment with his answer, and held that under the statutes a defendant may recover damages only on a writ of inquiry after he has won judgment on the issue of possession.[122]

As to the defendant's argument that the plaintiff's appeal was premature and would have to await the conclusion of the new trial on the issue of damages, the court looked back a full century to the case of *Tagert v. Baker,*[123] in which the trial court had set aside the third verdict rendered for the plaintiff and had granted the defendant a fourth trial. Conceding the vitality of the general rule that an appeal from an order granting a new trial does not lie until the new trial is held, the *Tagert* court ruled that the trial judge's grant of a fourth trial, in clear contravention of section 647 of the Mississippi Code of 1871,[124] was "exceptional and peculiar," and the appeal was heard.[125] Similarly, the *Durbin* court observed that the trial court in the instant case had issued its order granting a new trial only after simultaneously submitting the issues of possession and damages to the jury in violation of the replevin statutes.[126] As a result, the plaintiff's appeal was held to have been properly taken, the trial court's order directing a new trial on the issue of damages was reversed, and the case was remanded with instructions that the issue of possession should be tried first.[127]

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[119] Miss. Code Ann. § 11-37-127 (Supp. 1979), dealing with cases in which the plaintiff wins on the issue of possession, and *id.* § 11-37-129 (Supp. 1979), covering those cases in which the defendant is found entitled to possession, both provide for the recovery of damages by the prevailing party upon a writ of inquiry.

[120] 370 So. 2d at 1357.

[121] 359 So. 2d 1386, 1388 (Miss. 1978).

[122] 370 So. 2d at 1358.

[123] 57 Miss. 303 (1879).

[124] Currently Miss. Code Ann. § 11-7-213 (1972). *See* note 118 *supra.*

[125] 57 Miss. at 304-05.

[126] 370 So. 2d at 1359. *See* notes 119 through 122 and accompanying text *supra.*

The conclusion reached by the court as to the plaintiff's assignment of error was, by virtue of the replevin statutes, inescapable. The court's handling of the defendant's objection to the plaintiff's appeal, however, was a well-reasoned move toward judicial efficiency. Nothing is accomplished by the staging of a new trial on one issue when reversible error has been committed on another.

VI. Legislative Enactments

During the 1979 regular session, the Mississippi legislature passed several bills affecting civil procedure in the state's courts. The most significant of these enactments was the amendment of section 11-11-5 of the Mississippi Code, popularly known as the "railroad venue" statute.[128] Under the old statute, a plaintiff could bring an action against railroads and certain other companies in any county in which any part of such companies' routes or lines was located, which in many cases gave the plaintiff the option of establishing venue in any of the state's eighty-two counties.[129] The amended statute limits the available counties of venue to those in which the cause of action accrued, the defendant has his principal place of business, or in which the plaintiff resides.[130] The amendment was no doubt backed by a strong lobbying effort, and the affected companies can hardly be blamed for their objection to the old statute. It was surely with no sadness that they bid farewell to the days of defending the majority of their suits before rural juries who did not look upon them with favor.

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[127] 370 So. 2d at 1359.

[128] 1979 Miss. Laws ch. 319 (codified at Miss. Code Ann. § 11-11-5 (Supp. 1979)).

[129] Miss. Code Ann. § 11-11-5 (1972) (amended 1979) provided:

> Actions against any railroad, express, steamboat, power, superpower, telegraph or telephone corporation, or against individuals owning, managing, operating or controlling a railroad, express line or route, steamboat, power, superpower, telephone or telegraph line, or against any corporation or individuals owning, managing, operating or controlling a motor transportation line for the conveyance of passengers, freight or express, for hire, over the highways in the state of Mississippi, may be brought in any county in which any part of such railroad, express line or route, steamboat way, power, superpower, telephone or telegraph line or motor transportation line or route may be.

[130] *Id.* § 11-11-5 (Supp. 1979).

Also amended in 1979 was section 9-5-101, which establishes the time for responsive pleadings in chancery court made returnable in vacation. The old section required that the defendant answer or demur by noon on the return day;[131] the amendment moves that time back to 9:00 A.M. on the return day in order to "provide for a more efficient use of vacation days."[132]

Among the year's other legislative enactments bearing on civil procedure were: an amendment to the family court costs statute eliminating the former provision which allowed the taxing of up to five percent of child support payments as costs;[133] a renaming of all police courts as municipal courts along with other provisions addressing municipal court procedure;[134] and an act creating county judgeships in certain counties and establishing the salaries for county judges in the various counties.[135]

VII. CONCLUSION

The year of 1979 was not one of great change in the law governing Mississippi civil procedure. While some of the cases before the supreme court did present interesting analytical questions, none is likely to inspire heated debate among members of the bar.[136] The court's disposition of the matters before it was as a rule fair to the parties involved, though it is regrettable that it failed to take advantage of opportunities to clarify the law in such cases as *Allgood*[137] and *Ramsey*.[138] In the final analysis, Mississippi's civil procedure weathered 1979 without significant change or improvement.

Steven D. Orlansky

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[131] *Id.* § 9-5-101 (1972) (amended 1979).

[132] 1979 Miss. Laws ch. 362 (codified at MISS. CODE ANN. § 9-5-101 (Supp. 1979)).

[133] 1979 Miss. Laws ch. 397 (codified at MISS. CODE ANN. § 43-23-47 (Supp. 1979)).

[134] 1979 Miss. Laws ch. 401 (codified at MISS. CODE ANN. § 21-13-19, 21-23-1 to -21 (Supp. 1979)).

[135] 1979 Miss. Laws ch. 457 (codified at MISS. CODE ANN. §§ 9-9-1 to -11 (Supp. 1979)).

[136] One remarkable fact supporting this assertion is that of the 33 Mississippi Supreme Court decisions mentioned herein, there was not a single dissenting opinion.

[137] *See* notes 78 through 91 and accompanying text *supra*.

[138] *See* notes 102 through 112 and accompanying text *supra*.

CORPORATE & COMMERCIAL LAW

I. CORPORATIONS

The Mississippi Supreme Court handed down a significant decision with respect to corporate opportunities in 1979, establishing a two-prong test for determining when a business opportunity becomes a corporate opportunity.[1] It also made two rulings dealing with foreign corporations and their certificate of authority requirements,[2] and held in another case that a corporation was simply the alter ego of its owner for purposes of determining corporate and individual liability.[3] In addition, the state legislature passed an important piece of legislation concerning exemption from blue sky laws for foreign investment companies making limited offerings.[4]

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[1] Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1335 (Miss. 1979). To prove that a business opportunity was a corporate opportunity, the complainant must show that (1) under all the facts and circumstances the business opportunity was logically related to the corporation's existing or prospective activities and (2) the corporation is neither insolvent nor financially disabled as a result of misfeasance by one of the defendants. Having done this, the burden shifts to the fiduciary to absolve himself of liability by proving that the duty of fidelity, diligence and disclosure of material facts has been fully discharged. *Id.*

[2] Honey Fluff Donut Co. v. Daniel, Inc., 374 So. 2d 800, 801-02 (Miss. 1979) (MISS. CODE ANN. § 79-3-211 (1972) construed to mean that a foreign corporation is required to be qualified to do business only at the time the cause of action arose); Cheatham v. Kem Mfg. Corp., 372 So. 2d 1085, 1089 (Miss. 1979) (foreign corporation is exempt from certificate of authority requirement where it is engaged in interstate commerce and where the contract provides for acceptance or rejection in the corporation's home state).

[3] Thames & Co. v. Eicher, 373 So. 2d 1033, 1035 (Miss. 1979) (corporation was alter ego of owner because (1) owner owned all the stock, (2) did not know when deposed who the directors were, (3) had furnished funds for corporation which seemed to be inadequately capitalized, (4) corporation held no regular meetings and no minutes were kept, and (5) owner had treated corporation as though it were not in existence).

[4] H.R. 970, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 320, 1979 Miss. Laws, *codified at* MISS. CODE ANN. § 75-71-53 (Supp. 1979). Prior to this enactment no exemption had existed for foreign investment companies. The exemption granted by the amendment applies when the total number of purchasers does not exceed 10 and the domestic investment company has not previously offered or sold any of its securities during the 24 months immediately preceding the date of the proposed offering or sale.

A. *Conflict of Interest*

Corporate officers and directors[5] stand in a fiduciary relationship[6] with the corporation and the shareholders and have been referred to as "quasi-trustees."[7] Because of that relationship, they must exercise loyalty and utmost good faith.[8] In furtherance of this fiduciary obligation a director or officer owes two duties[9] to the corporation and to its shareholders: (1) a duty of care,[10] which is usually limited by the business judgment rule,[11] and (2) a duty of loyalty,[12] which prohibits a director from having a conflict of interest.

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[5] It should be noted that while courts generally do not differentiate between the liabilities of officers and directors, important differences exist between the two positions. 74 HARV. L. REV. 765, 769 (1961). First, the salary of the director is often much lower than that of the officer; second, the director does not keep up with the day to day affairs of the corporation. *Id.*

[6] *E.g.*, Home Tel. Co. v. Darley, 355 F. Supp. 992, 999 (N.D. Miss. 1973), *aff'd per curiam,* 489 F.2d 1403 (5th Cir. 1974); American Empire Life Ins. Co. v. McAdory, 319 So. 2d 237, 240 (Miss. 1975); Cooper v. Mississippi Land Co., 220 So. 2d 302, 307 (Miss. 1969); Knox Glass Bottle Co. v. Underwood, 228 Miss. 699, 742, 89 So. 2d 799, 814 (1956), *suggestion of error overruled,* 91 So. 2d 844, *cert. denied,* 353 U.S. 977 (1957).

[7] *See, e.g.,* Schildberg Rock Prods. Co. v. Brooks, 258 Iowa 759, 140 N.W.2d 132, 136 (1966) (officers and directors are trustees and quasi-trustees of corporate assets); Pioneer Oil & Gas Co. v. Anderson, 168 Miss. 334, 344, 151 So. 161, 163 (1933) (directors and other governing members are quasi-trustees and agents of corporation).

[8] Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332 (Miss. 1979).

[9] *See* 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 127.01 (1979) (two duties: diligence and loyalty). Some commentators have expanded the number of duties to three: diligence, obedience, and loyalty. *See, e.g.,* W. KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 1.05 (3d ed. 1978).

[10] Briggs v. Spaulding, 141 U.S. 132, 152 (1891) (degree of care is that of "ordinarily prudent and diligent men in the same situation"). The standard is one of reasonable prudence and care and since most corporate decisions are merely matters of judgment, courts have not readily imposed liability for good faith actions. *See, e.g.,* Selheimer v. Manganese Corp., 423 Pa. 563, 224 A.2d 634, 644 (1966) ("(a) the directors of a business corporation are not insurers that their actions will result in pecuniary profit and they are, in the course of their duties, called upon to undertake certain calculated 'business risks'; (b) for errors in judgment, exercised in good faith, the directors of a corporation should not be penalized. . . . ").

[11] *See, e.g.,* Shlensky v. Wrigley, 95 Ill. App. 2d 173, 237 N.E.2d 776, 780 (1968) (courts will not interfere with honest business judgment of the directors unless it borders on fraud, illegality, or conflict of interest). *But see* Neese v. Brown, 218 Tenn. 686, 405 S.W.2d 577, 580 (1964) ("It is generally held that the liability of the directors and other officers of a corporation is not limited to wilful breaches of trust or excessive power but also extends to negligence."). For further consideration of the negligence issue, see Casey v. Woodruff, 49 N.Y.S.2d 625, 642 (App. Div. 1944) (mistakes in "honest" business judgment not negligence). *See also* Miller v. American Tel. & Tel. Co., 507 F.2d 759, 762 (3d

The Supreme Court of Mississippi recently examined a case involving two areas in which a conflict of interest may arise. The case, *Ellzey v. Fyr-Pruf, Inc.*,[13] contained elements of self-dealing and usurpation of a corporate opportunity. The court affirmed its stand taken in *Knox Glass Bottle Co. v. Underwood*[14] as to self-dealing[15] and designed a two-level test to determine

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Cir. 1974) (director may not invoke business judgment rule where illegality is involved); Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 188 A.2d 125, 130 (1963) (negligence in failing to discover the wrongful acts of other officers and directors may be sufficient to impose liability); Allied Freightways, Inc. v. Cholfin, 325 Mass. 630, 91 N.E.2d 765, 768 (1950) (director of a corporation, other than a bank, is not liable for mere errors in judgment unless there is a showing of clear and gross negligence).

[12] The director must avoid all dealings which would conflict with duties owed to the corporation. An officer or director may not use his position to reap secret profits for himself. *See, e.g.*, Diamond v. Oreamuno, 24 N.Y.2d 494, 238 N.E.2d 910, 301 N.Y.S.2d 78, 80-81 (1969) (states general common law principle that knowledge acquired by a fiduciary by virtue of his position may not be used for his personal advantage; he must account to the corporation whether or not the corporation is actually damaged); Seaboard Indus., Inc. v. Mona Co., 442 Pa. 256, 276 A.2d 305, 309 (1971) (citing Lutherland, Inc. v. Dahlen, 357 Pa. 143, 151, 53 A.2d 143, 147 (1947) for proposition that directors and officers are to promote the interests of the corporation and not their own interests); State *ex rel.* Hayes Oyster Co. v. Keypoint Oyster Co., 64 Wash. 2d 388, 391 P.2d 979, 985 (1964) (actual fraud or injury is not required to impose liability if the fiduciary breaches his fidelity to the corporation by acting for his own personal gain).

[13] 376 So. 2d 1328 (Miss. 1979).

[14] 228 Miss. 699, 89 So. 2d 799 (1956), *cert. denied*, 353 U.S. 977 (1957).

[15] Self-dealing results when a corporate officer or director contracts with the corporation, of which he is an agent, and the fiduciary bargains on behalf of himself and the corporation for his own personal gain. According to a commentator, in 1880 "any contract between a director and his corporation was voidable at the instance of the corporation or its shareholders, without regard to the fairness or unfairness of the transaction." Marsh, *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 Bus. Law. 35, 36, 40 (1966).

Today many states have adopted the Model Business Corporations Act, which provides:

> No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association or entity in which one or more of its directors are directors or officers or are financially interested, shall be either void or voidable because of such relationship or interest or because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction or because his or their votes are counted for such purpose, if:
>
> (a) the fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves, or ratifies the contract or transaction by a vote or consent sufficient for the purpose without

when a business opportunity becomes a corporate opportunity.[16]

> counting the votes or consents of such interested directors; or
>
> (b) the fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify such contract or transaction by vote or written consent; or
>
> (c) the contract or transaction is fair and reasonable to the corporation.
>
> Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction.

MODEL BUS. CORP. ACT ANN. 2d § 41 ¶1 (1971). Mississippi has not adopted this act.

However, in Mississippi if an officer or director represents both the corporation and himself in a contract with the corporation, under the principles laid down in *Knox Glass*, if there is no ratification by the shareholders and the corporation of the contract and there is no full disclosure, the fiduciary is liable to the extent of his profits, since they are the result of unjust enrichment; the elements of good faith, actual loss to the corporation, and fairness of the contract are irrelevant in such a situation. When the contract is fully disclosed or ratified, it may still be attacked as to its fairness and the fiduciary's good faith. Under such circumstances the fiduciary has the burden of proving the contract's inherent fairness. Knox Glass Bottle Co. v. Underwood, 228 Miss. 699, 89 So. 2d 799, 813-16 (1956), *cert. denied*, 353 U.S. 977 (1957).

The *Ellzey* court reaffirmed *Knox Glass*, holding "that 'self-dealing,' i.e., a situation in which the corporation and its fiduciary bargain on opposite sides . . . of the transaction forming the basis of the suit, automatically raises a presumptive conflict of interest, thus shifting the burden to the fiduciary to justify his conduct." Ellzey v. Fyr-Pruf, Inc., 376 So. 2d at 1332.

[16] 376 So. 2d at 1332-35. The leading case in the corporate opportunity field is Guth v. Loft, Inc., 23 Del. Ch. 271, 5 A.2d 503 (1939), and is noted for having established the "line of business" test. The standard applied in that case was defined by the court as follows:

> It is true that when a business opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest in it, if, of course, the officer or director has not wrongfully embarked the corporation's resources therein. . . .
>
> On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

5 A.2d at 510-11. *See* Equity Corp. v. Milton, 43 Del. Ch. 160, 221 A.2d 494, 497 (1966) (officer may not seize business opportunity for himself that is offered to the corporation, which the corporation could undertake and which is of advantage or interest to it); Miller v. Miller, 301 Minn. 207, 222 N.W.2d 71, 78 (1974) (no exploitation by fiduciary of

Ellzey involved a stockholders' derivative suit[17] in which it

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opportunity belonging to corporation); Diedrick v. Helm, 217 Minn. 483, 14 N.W.2d 913, 919 (1944) (fiduciary may not "divert corporate opportunities to his own use;" if outside scope of duties, he may divert); Hubbard v. Pape, 2 Ohio App. 2d 326, 203 N.E.2d 365, 368 (1964) (fiduciary cannot "appropriate the opportunity of financial or business gain" for self if advantageous to corporation); W. KNEPPER, *supra* note 9, at § 3.01 (usurpation of corporate opportunity); 74 HARV. L. REV. 765, 768-69 (1961) (discussion of "line of business" test; used mainly in individual contracts); Annot., 77 A.L.R.3d 961 (1977) (discussion of what business opportunities fall within "line of business").

A second rule or test is called the "interest or expectancy test," which prohibits a corporate officer or director from taking advantage of a business opportunity in which the corporation already has an interest or might be expected to have an interest based on some present right. *See, e.g.,* Burg v. Horn, 380 F.2d 897, 899-900 (2d Cir. 1967) (director may not buy property under lease to corporation, take away its present customers, buy property corporation needs or is about to acquire, or misuse offer or knowledge for himself); Abbott Redmont Thinlite Corp. v. Redmont, 324 F. Supp. 965, 971 (S.D.N.Y. 1971) (property in which corporation had "tangible expectancy" when officer acquired it is covered by corporate opportunity doctrine); Cox and Perry, Inc. v. Perry, 334 So. 2d 867, 869 (Ala. 1976) (no misuse of corporate opportunity by officer where corporation had no preexisting interest or right in the property); Lagarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199, 201 (1900) (breach of fiduciary duty for officer to take away property rights "in antagonism to the corporate interest;" equity will not allow this); Blaustein v. Pan Am Petroleum & Transp. Co., 293 N.Y. 281, 56 N.E.2d 705, 713 (1944) (interest of corporation must be at the time of acquisition by officer; cannot be acquired later). *See generally* W. KNEPPER, *supra* note 9, at § 3.01; Slaughter, *The Corporate Opportunity Doctrine,* 18 SW. L.J. 96, 114 (1964); 74 HARV. L. REV. 765, 765 (1961).

A third test is based upon "fairness." *See, e.g.,* Weiss v. Kay Jewelry Stores, Inc., 470 F.2d 1259, 1270 (D.C. Cir. 1972) (test is whether fiduciary has acquired something that "in all fairness" belongs to corporation); Alvest, Inc. v. Superior Oil Corp., 398 P.2d 213, 215 (Alaska 1965) (fiduciary takes advantage of that which ethically, fairly and equitably should belong to corporation); Durfee v. Durfee & Canning, Inc., 323 Mass. 187, 80 N.E.2d 522, 529 (1948) (doctrine rests basically on unfairness); Rosenblum v. Judson Eng'r Corp., 99 N.H. 267, 109 A.2d 558, 563 (1954) (bad faith not essential; if business opportunity should fairly belong to the corporation, fiduciary should obtain it for corporation).

In the Mississippi case of Pioneer Oil & Gas Co. v. Anderson, 168 Miss. 334, 344, 151 So. 161, 163 (1933), the Mississippi Supreme Court made one of its first statements concerning corporate opportunities, holding that a director or officer is in breach of his fiduciary obligations if he acquires property in opposition to the interests of the corporation. *Id.* at 345, 151 So. at 163. Other cases in Mississippi have prohibited fiduciaries from acting in conflict with the best interests of the corporation but no substantive tests were laid down to determine which interests properly belonged to the corporation. *See* Home Tel. Co. v. Darley, 355 F. Supp. 992, 998-99 (N.D. Miss. 1973) (necessary to act in best interests of corporation); American Empire Life Ins. Co. v. McAdory, 319 So. 2d 237, 241 (Miss. 1975) (citing *Pioneer*), *aff'd on remand,* 370 So. 2d 919 (Miss. 1979). The only statutory guidance available may be found in MISS. CODE ANN. § 79-3-67 (1972), which provides:

> The business and affairs of a corporation shall be managed by a board of

was alleged that Yarborough, Fox, Lollar and Allen, officers and directors of Fyr-Pruf, had taken business opportunities properly belonging to the corporation.[18] These officers and directors, on behalf of Fyr-Pruf, had sought to obtain equipment,[19] new manufacturing facilities[20] and loans[21] to finance the purchases. However, the Small Business Administration turned down the corporation's loan application. The following day a charter was issued forming a new corporation, Bondafoam, Inc., which engaged in the same type of business as Fyr-Pruf and which was begun through the managerial and investment efforts of the officers and directors of Fyr-Pruf.[22] With Fyr-Pruf unable to purchase the needed equipment, Yarborough, Allen, and Lollar purchased it "surreptitiously" on behalf of Bondafoam, Inc.[23]

One of the primary questions in the case concerned the financial ability of Fyr-Pruf to acquire the business opportunity. If Fyr-Pruf were insolvent at the time of the purchase, the business opportunity could not have been a corporate opportunity.[24]

> directors. Directors need not be residents of this state or shareholders of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors. The board of directors shall have authority to fix the compensation of directors unless otherwise provided in the articles of incorporation. No person who is engaged or interested in a competing business either individually or as employee or stockholder, shall serve on any board of directors of any corporation without the consent of a majority of interest of the stockholders thereof.

[17] 376 So. 2d at 1330.

[18] *Id.*

[19] *Id.* at 1330-31. The Fyr-Pruf Corporation had sought additional equipment to expand its carpet padding production. *Id.* at 1330.

[20] Fyr-Pruf had lost its manufacturing facility when the lease changed ownership and new facilities were required if the corporation was to remain a going concern. *Id.*

[21] To obtain the facilities and equipment, Fyr-Pruf sought a loan from the Small Business Administration but was turned down. *Id.* at 1330-31.

[22] *Id.* at 1331.

[23] *Id.* The Bondafoam Corporation also leased the facilities that Fyr-Pruf had been considering. *Id.*

[24] This is true assuming that the insolvency is not caused by the fiduciary. The primary question is whether the business opportunity is one belonging to the corporation. *See* Miller v. Miller, 301 Minn. 207, 222 N.W.2d 71, 81 (1974).("The threshold question to be answered is whether a business opportunity presented is also a 'corporate' opportunity, i.e., whether the business opportunity is of sufficient importance and is so closely related to the existing or prospective activity of the corporation as to warrant judicial sanctions against its personal acquisition by a managing officer or director of the corporation.").

The court concluded that the corporation's assets exceeded its liabilities and that it was therefore solvent as of March 31, 1971.[25] Specific issues with regard to Fyr-Pruf's assets concerned (1) whether a $40,000 debit to "Receivable from Stockholders" was actually a valid asset[26] and (2) whether lease-purchase equipment should be considered an asset.[27] The court concluded in both instances that the evidence supported their denomination as assets.[28]

The court noted that in self-dealing situations, where a director and the corporation bargain on opposite sides of a transaction, a presumption of conflict of interest automatically arises, thereby shifting the burden of proof to the fiduciary. However, the court stated that such was not the case with diversion of corporate opportunities; only when the complainant shows by a preponderance of the evidence that the business opportunity was a corporate opportunity does the burden of proof shift to the fiduciary.[29]

Relying on a Minnesota case,[30] the court held that to prove a corporate opportunity a complainant must first show "by a preponderance of the evidence that under all the facts and circumstances the business opportunity logically related to the corporation's existing or prospective business activities."[31] Nevertheless, it rejected in part the second portion of the Minnesota test, which required the complainant to show that the corporation had the financial ability to take advantage of the opportunity. Instead, the Mississippi court favored requiring the complainant to prove that the corporation was either (1) solvent in terms of the balance sheet at the time or (2) "financially disabled" as a result of a breach of a fiduciary duty or a failure by a defendant to pay a debt.[32] Once these two requirements[33] are satisfied, the business opportunity may be classified properly as a corporate opportunity and the burden of proof shifts to the fiduciary, who must then meet the requirements set out in *Knox Glass*.[34] To escape liability, the fiduciaries must show that they met the required duties of fidelity, diligence, and disclosure;[35] and where the corporation is a "going concern," the fiduciaries must show that "they did not compete to the economic detriment of the corporation."[36] Even where the corporation has not been harmed, good faith alone is not enough to shelter the fiduciaries from the resulting liability.[37]

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[25] 376 So. 2d at 1331. However, the lower court's holding that "Fyr-Pruf had become insolvent by May of 1971" was held to be the result of an "erroneous application of the burden of proof" upon the complainants and was remanded for re-examination. *Id.* at 1332.

[26] *Id.* at 1331. The court stated that as fiduciaries the officers had the burden of showing by clear and convincing evidence that there was "inherent fairness" in their receiving value from the corporation at "less than full and adequate consideration." *Id.* *See* Smith v. Mississippi Livestock Producers Ass'n, 188 So. 2d 758, 763 (Miss. 1966) (burden of proof on fiduciary).

[27] 376 So. 2d at 1331. The court held that legal title is not decisive and that it may even be immaterial when the transaction is of the lease-purchase option type. *Id.* MISS. CODE ANN. § 75-9-202 (1972) provides: "Each provision of this chapter with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor." *See* United Rental Equip. Co. v. Potts & Callahan Contracting Co., 231 Md. 552, 191 A.2d 570, 573 (1963) (lease-purchase agreement held to be a "security interest created by contract" that should have been recorded for lessor's protection); Nickell v. Lambrecht, 29 Mich. App. 191, 185 N.W.2d 155, 157 (1970) (lease agreement held to be a "conditional sales or title-retaining contract"); Continental Leasing Corp. v. Lebo, 217 Pa. Super. Ct. 356, 272 A.2d 193, 196 (1970) (restaurant lease held to be security interest).

[28] 376 So. 2d at 1331-32.

[29] *Id.* at 1332.

[30] Miller v. Miller, 301 Minn. 207, 222 N.W.2d 71 (1974).

The test used by the court in making the determination of whether a business opportunity has been shown to be a corporate one is well-reasoned and moderate in its consideration of the financial ability of a solvent corporation.[38] But once the test has been met by the complainant, the stringent requirements of fidelity, diligence, and full disclosure are imposed to overcome the charge of usurpation of a corporate opportunity.

The court properly interpreted the test laid out in the Minnesota case as to a determination of what a corporate opportunity is, but it neglected to discuss the "second step" in the Minnesota test, which applies after a business opportunity has been shown to be a corporate opportunity. At that point the officer or director may avoid liability if he can show that he acted in good faith, dealt fairly with the corporation, and did not violate his duty of loyalty.[39] However, the Minnesota court stated, as did the *Ellzey* court, that good faith alone would not be sufficient to avoid liability and that the fiduciary would have the burden of proof.[40] Nevertheless, by attempting to combine the "business line" test with the "fairness" test,[41] the Minnesota court has provided a more equitable approach than that found in *Knox Glass* or *Ellzey*. Therefore, it is recommended that the court relax the requirements of *Knox Glass* and apply the more "ethical standards of what is fair and equitable under the circumstances."[42]

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[31] 376 So. 2d at 1333, 1335.

[32] *Id.* at 1333-35.

[33] The court modified the two-prong *Miller* test, upholding the second part of the test so long as the financial inability is unquestioned and imposing liability when the fiduciary has caused the financial problems. *Id.*

[34] *Id.* at 1335.

[35] *Id.*

[36] *Id.* at 1335-36.

[37] *Id.* at 1335.

[38] *Contra,* Irving Trust Co. v. Deutsch, 73 F.2d 121, 124 (2d Cir. 1934) (prohibiting the taking of a related business opportunity regardless of the financial inability of the corporation).

II. COMMERCIAL LAW

Most of the judicial proceedings in commercial law centered around banking, negotiable instruments, and secured transactions; however, there were other cases in the areas of sales,[43] bankruptcy,[44] and consumer credit[45] as well. In a case involving negotiable instruments, the court held that a loss stemming from a forged endorsement should fall on the payor bank, since that party was in the best position to prevent the loss.[46] Concerning promissory notes, the court ruled that under section 75-3-408 of the Mississippi Code no consideration was necessary for a note given in payment of or security for an antecedent obligation.[47] This decision firmly establishes that the Uniform Commercial Code, adopted by the legislature in 1966,[48] is controlling, regardless of pre-Code decisional law.[49] In another case, the constitutionality of the Uniform Commercial Code's self-help repossession statute[50] was upheld.[51]

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[39] 222 N.W.2d at 81. "Thus the second step in the . . . determination of the ultimate question of liability involves close scrutiny of the equitable considerations existing prior to, at the time of, and following the officer's acquisition." *Id.*

[40] *Id.* at 82. The *Miller* court also included diligence as one of the factors. *Id.*

[41] *See* note 16 *supra.*

[42] 222 N.W.2d at 80. The *Miller* court stated that the significant factors to look to were:

> the officer's relationship to the management and control of the corporation; whether the opportunity was presented to him in his official or individual capacity; his prior disclosure of the opportunity to the board of directors or shareholders and their response; whether or not he used or exploited corporate facilities, assets, or personnel in acquiring the opportunity; whether his acquisition harmed or benefited the corporation; and all other facts and circumstances bearing on the officer's good faith and whether he exercised diligence, devotion, care, and fairness toward the corporation which ordinarily prudent men would exercise under similar circumstances in like positions.

Id. at 81-82.

[43] Wander Ltd. v. Krouse & Co., 368 So. 2d 235, 237 (Miss. 1979) (anticipatory breach of contract under MISS. CODE ANN. § 75-2-610 (1972) gives the aggrieved party the right to cover and to measure damages by the difference between the contract price and the cover price).

A. *Banks and Banking*

The court made few dramatic pronouncements in the area of banking during 1979.[52] However, it made two decisions of considerable importance to the banking community in cases involving negotiable instruments.

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[44] Home Bldg. Mart, Inc. v. Parker, 370 So. 2d 916, 919 (Miss. 1979) (statute of limitations on a materialman's lien is tolled when bankruptcy proceedings commence and does not begin running again until the bankruptcy court declares the property formally abandoned).

[45] Ray v. Acme Fin. Co., 367 So. 2d 186, 188 (Miss. 1979) (Truth in Lending Act, 15 U.S.C. § 1639 (1976) [implemented by 12 C.F.R. § 226.4 (1977)] violated where insurance for accident and health is not included in finance charge unless the customer is informed of its absence and told that he must sign a request to obtain the insurance).

[46] Foremost Ins. Co. v. First City Sav. & Loan Ass'n, 374 So. 2d 840, 843 (Miss. 1979) (reaffirming Mississippi Bank & Trust Co. v. County Supplies and Diesel Serv., Inc., 253 So. 2d 828, 830 (Miss. 1971)).

[47] First Nat'l Bank v. Carver, 375 So. 2d 1198, 1199 (Miss. 1979) (note given by widow as satisfaction for debt of deceased husband).

[48] Act of May 31, 1966, 1966 Miss. Laws ch. 316, § 10-102, *codified at* MISS. CODE ANN. §§ 75-1-101 to 75-10-104 (1972). The Act became effective on March 31, 1968.

[49] 375 So. 2d at 1199.

[50] MISS. CODE ANN. § 75-9-503 (1972).

[51] McComb Equip. Co. v. Cooper, 370 So. 2d 1367, 1368 (Miss. 1979) (fourteenth amendment inapplicable where, as here, property is repossessed without any state action).

[52] The Mississippi State Legislature, on the other hand, passed several bills in 1979, the most important of which was H.R. 1034, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 420, 1979 Miss. Laws, *codified at* MISS. CODE ANN. § 81-5-40 (Supp. 1979), requiring banking corporations organized under the laws of a foreign country to be licensed by the state banking board. In addition, the legislature passed some minor provisions in the banking area, including: S.R. 2551, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 406, 1979 Miss. Laws, *codified at* MISS. CODE ANN. § 81-3-7(d) (Supp. 1979) (reducing

In *Brickell v. First National Bank,*[53] the court held that in order to recover a deposit one must prove an actual loss resulting from a bank's negligence.[54] Having failed to meet this burden,[55] the complainant in *Brickell* was denied relief despite his allegations of negligence.[56]

In *Foremost Insurance Co. v. First City Savings & Loan Association,*[57] the court, construing section 75-3-307 of the Mississippi Code,[58] held that when a signature's validity has been put in issue the burden of proving its authenticity falls upon the one claiming under it.[59] The court in *Foremost* also reaffirmed the principle that a drawee bank may rely on presentment war-

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minimum par value of capital stock from $5 to $1); S.R. 2631, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 340, 1979 Miss. Laws, *codified at* MISS. CODE ANN. §§ 81-1-5, 81-3-13(3) (Supp. 1979) (providing that the senate shall have the right to advise in and consent to the appointment of the State Comptroller and members of the state banking board); and S.R. 2106, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 365, 1979 Miss. Laws (repealing MISS. CODE ANN. § 67-3-71 (1972), which prohibited the collection of debts for intoxicating liquors).

[53] 373 So. 2d 1013, 1023-25 (Miss. 1979). In this consolidated action one of the plaintiffs, a corporate operator of a liquidated automobile dealership, sought, among other things, to have funds restored which had been debited improperly by the bank. *Id.* at 1021.

[54] *Id.* at 1025.

[55] *Id.*

[56] *Id.* at 1014-22. Included in the allegations of wrongdoing by the bank were: (a) paying checks drawn on the accounts of others out of the dealership account; (b) paying sight drafts through the dealership account by the technique of debiting the dealership account; and (c) paying checks and drafts signed by individuals purportedly on behalf of the dealership when the individuals were not authorized "to sign such checks or drafts and debiting the checks or drafts to the account of the dealership." *Id.* at 1021.

[57] 374 So. 2d 840, 843 (Miss. 1979). In *Foremost,* one of the two named payees of a draft issued by Foremost Insurance Company presented the draft to First City Savings and Loan for payment. The endorsement of the other payee, who held a lien on the excess proceeds of the draft, was forged. Because only one of the signatures was authentic, the draft was charged back to First City, who then filed suit against the drawee, Foremost, to recover the amount. The court reversed the trial court's denial of a directed verdict for Foremost. *Id.* at 842.

[58] MISS. CODE ANN. § 75-3-307 (1972) provides in part: "(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue (a) the burden of establishing it is on the party claiming under the signature. . . ."

[59] 374 So. 2d at 843.

ranties made to it[60] that the endorsements on a draft are genuine.[61] Because of this, the court held that any loss from a forged endorsement should fall on the payor bank, since it was in the best position to verify the endorsement and thereby prevent the loss.[62] The *Foremost* case reaffirmed several prior decisions[63] and exhibits the steady course maintained by the court in this area.

B. *Bills and Notes*

In *Brannon v. Langston,*[64] the court dealt with the issue of whether a negotiable instrument may be discharged by an oral agreement if it is supported by consideration.[65] The court concluded that a negotiable instrument could be discharged when the consideration flows to the party seeking enforcement of the instrument.[66] The court also rendered a decision in which it upheld the validity of the Uniform Commercial Code vis-à-vis pre-Code law. In *First National Bank v. Carver,*[67] a widow had executed a note to a bank in exchange for the bank's cancelling of a similar indebtedness of her husband.[68] She subsequently executed two renewal notes. The bank filed suit against Mrs. Carver, who alleged[69] as an affirmative defense that the note was unenforceable because of the absence of consideration in its execution.[70] The court concluded that pre-Uniform Commercial Code law was no longer controlling and looked instead to section 75-3-408[71] of the Mississippi Code. When read with the comments to that section's counterpart in the Uniform Commercial Code,[72] it is evident that no consideration is necessary for the

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[60] MISS. CODE ANN. § 75-3-417 (1972) (warranties on presentment and transfer).

[61] 374 So. 2d at 843.

[62] The court gave two reasons for First City's inability to recover as a matter of law in this case. First, it did not have the rights of a holder because the instrument had not been negotiated, and therefore could not be a holder in due course. *Id.* at 842. *See* FDIC v. Marine Nat'l Bank, 413 F.2d 341, 344 (5th Cir. 1970) (absent the required signatures of all payees a draft is not negotiated); MISS. CODE ANN. § 75-3-202 (1972) (providing that an instrument payable to order must be delivered "with any necessary endorsement"). Second, because First City had bad title to the instrument by virtue of claiming through the forged endorsement, it breached its warranty of presentment when it passed the draft on through the collection process. 374 So. 2d at 843. *See* MISS. CODE ANN. § 75-3-417 (1972), which provides in part: "(1) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title. . . ."

[63] *E.g.,* Mississippi Bank and Trust Co. v. County Supplies and Diesel Serv., Inc., 253 So. 2d 828, 830 (Miss. 1971) (drawee bank may recover on a check with a forged endorsement against a collecting bank based upon the warranties made by the collecting bank); Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 72, 16 So. 2d 384, 390 (1944) (drawee bank's obligation to know the signature of its depositors does not extend to the signature of endorsers on checks).

[64] 375 So. 2d 231 (Miss. 1979).

[65] *Id.* at 232.

[66] *Id.* The court noted that in the absence of consideration, a negotiable instrument may only be cancelled by the methods enumerated in MISS. CODE ANN. § 75-3-605 (1972); but where there is consideration which flows to the party seeking the instrument's enforcement one must look to two other code sections: (1) *id.* § 75-3-305(2) (1972) (a holder in due course does not take an instrument free of defenses from the party with whom he is dealing); (2) *id.* § 75-3-601(2) (1972) ("Any party is also discharged from his liability

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on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money."). *See* Hazlehurst Oil Mill & Fertilizer Co. v. Booze, 160 Miss. 136, 138, 133 So. 120, 121 (1931) (the Negotiable Instruments Law, MISS. CODE ANN. § 2778 (1930) (repealed 1966), states the rule of common law that negotiable instruments are discharged "[b]y any . . . act which will discharge a simple contract for the payment of money").

[67] 375 So. 2d 1198 (Miss. 1979) (overruling Lowndes Coop. Ass'n v. Lipsey, 240 Miss. 71, 126 So. 2d 276 (1961)).

[68] 375 So. 2d at 1198.

[69] There were also questions as to whether there was forbearance by the bank in failing to pursue its original claim against Mr. Carver while he was still alive and whether Mrs. Carver waived her defense by renewing the notes with full knowledge of the facts. *Id.* at 1199.

[70] *Id.* Mrs. Carver placed principal reliance upon the pre-Code law of Sykes v. Moore, 115 Miss. 508, 510, 76 So. 538, 539 (1917) (a note by a widow executed in exchange for the extinguishment of her deceased husband's debt is not sufficient consideration unless she obtains assets from his estate) (overruled by First Nat'l Bank v. Carver, 375 So. 2d 1198 (Miss. 1979)).

[71] MISS. CODE ANN. § 75-3-408 (1972) provides:

> Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3-305) [§ 75-3-305], *except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind.* Nothing in this section shall be taken to displace any statute outside this code under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount. (emphasis added).

[72] U.C.C. § 3-408, Comment 2 (1972), *cited in* First Nat'l Bank v. Carver, 375 So. 2d at 1199 n.2, provides: "The 'except' clause is intended to remove the difficulties which have arisen where a note or a draft, or an indorsement of either, is given as payment or as security for a debt already owed by the party giving it, *or by a third person.*" (emphasis in original).

payment of an antecedent debt belonging to a third party.[73] Therefore, the court reversed the trial court and found that consideration was not required to make the note enforceable.[74]

Although this case has no profound impact upon commercial law, it does demonstrate the significance of the Uniform Commercial Code's influence on pre-Code law.

C. *Secured Transactions*

Although the Mississippi Supreme Court made no significant changes with respect to the law of secured transactions,[75] it did consider some gray areas in this field. For example, the court upheld the constitutionality of self-help repossession.[76] It also considered questions surrounding the requirement of notice of intention to dispose of collateral,[77] security interests on crops,[78] requisites of financing statements,[79] and damages to secured property.[80]

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[73] 375 So. 2d at 1199. *See* First Nat'l Bank v. Achilli, 14 Ill. App. 3d 1, 301 N.E.2d 739, 743 (1973) ("A note signed as security for an antecedent claim or debt, even though signed by a third party, needs no consideration.").

[74] 375 So. 2d at 1199-1200. The court held Mrs. Carver liable on the note and remanded for a determination of reasonable attorney's fees incurred by the bank in suing upon the note. *Id.* at 1200.

[75] The legislature, however, did alter one law of secured transactions by amending MISS. CODE ANN. § 75-9-403 (1972). The purpose of the amendment is "to provide for the filing of continuation statements to financing statements recorded in real estate records." S.R. 2369, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 369, 1979 Miss. Laws. This statement does not accompany the codified supplement to § 75-9-403 of the Mississippi Code. Such a deletion may be fortunate since it appears that the amendment does not require the filing of a continuation statement to financing statements in real estate records. Examination of the statute itself reveals that a continuation statement is not necessary because "[a] real estate mortgage which is effective as a fixture filing . . . *remains effective* as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates." MISS. CODE ANN. § 75-9-403(b) (Supp. 1979) (emphasis added). Also, the Official Comment to the 1972 version of the U.C.C. states that financing statements for real estate mortgages which serve as fixture statements and which are filed with real estate mortgages are "valid for the life of the obligations secured." U.C.C. § 9-403, Comment 2 (1972). The amended section also revises filing fees, MISS. CODE ANN. § 75-9-403(5)(a) (Supp. 1979), and requires the filing officer to return the financing statement, or a copy thereof, to the secured party. *Id.* § 75-9-403(6) (Supp. 1979).

[76] McComb Equip. Co. v. Cooper, 370 So. 2d 1367 (Miss. 1979).

[77] In McKee v. Mississippi Bank & Trust, 366 So. 2d 234 (Miss. 1979), the court discussed MISS. CODE ANN. § 75-9-501(3) (1972), which defines a secured party's rights upon default by a debtor. This section prohibits waiver of the notice which the secured party must give the debtor when the former intends to sell or dispose of collateral. *Id.* The exceptions to this rule are stated in *id.* § 75-9-504(3) (1972), which permits waiver

1. Self-help Repossession

a. Federal Precedents

Self-help repossession existed as a remedy at common law[81]

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where the "collateral is perishable or threatens to decline speedily in value or is a type customarily sold on a recognized market." *Id.* The *McKee* court noted that since the property involved in the instant case did not fall within one of these exceptions, waiver of notice was technically forbidden. 366 So. 2d at 236. But the court recognized that this analysis of waiver would have been different if the amended version of MISS. CODE ANN. § 75-9-504(3) (Supp. 1979) had been applied. That amendment provides that notification must be given unless one debtor, after default, signs a statement modifying this right. *Id.* The 1972 version was applied, however, since one transaction between the parties occurred before the new version was adopted. 366 So. 2d at 237.

[78] Oxford Prod. Credit Ass'n v. Dye, 368 So. 2d 241, 241-42 (Miss. 1979) (citing MISS. CODE ANN. §§ 75-9-306(2) and-307(1) (1972)) (a purchaser of a cotton crop with a perfected security interest is jointly liable with the seller-farmer who created the security interest, even though the cotton was ginned and stored at the time).

[79] In Travelers Indem. Co. v. First Nat'l Bank, 368 So. 2d 836 (Miss. 1979), the court examined the unamended version of MISS. CODE ANN. § 75-9-402(1) (1972), which states that a sufficient financing statement must be signed both by the debtor and the secured party, but that a copy of the security agreement is sufficient as a financing statement if their signatures appear on it. In *Travelers*, a financing statement that was not signed by the debtor was filed. Stapled to the statement was an indemnity agreement that was signed by the debtor but not by the secured party. The court held that "[t]he deficiency in each of the documents was not cured by stapling them together and filing them as one instrument." 368 So. 2d at 838. However, the pertinent section of the Mississippi Code was amended so that a security agreement is now sufficient as a financing statement when signed by the debtor alone. MISS. CODE ANN. § 75-9-402 (Supp. 1979).

[80] In Nationwide Ins. Co. v. Bank of Forest, 368 So. 2d 1273 (Miss. 1979), a driver who was insured by Nationwide collided with an automobile in which the Bank of Forest held a security interest. Since the insurer negligently had paid the debtor without first checking for outstanding liens, Nationwide was liable to the secured party for the amount paid to the debtor. *Id.* at 1275.

[81] Historically, self-help repossession was permitted "as a result of weakness of the legal institutions that control self-help impulse," rather than as the result of "a conscious weighing of policies." 82 DICK. L. REV. 351, 352 (1978). There was a gradual movement away from this remedy, however, and by the time of the Norman conquest it was almost completely abolished. *Id.* The feudal system facilitated a resurgent interest in self-help repossession since the feudal landlord needed to protect his property while it was in the tenant's possession. *Id.* at 352-53. Only peaceful repossession was allowed, however, since it was recognized that "public peace is a superior consideration of any man's private property; and . . . this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society." *Id.* at 353 (quoting 3 W. BLACKSTONE, COMMENTARIES *4-5). The self-help remedy appeared in

and is now embodied in section 9-503 of the Uniform Commercial Code.[82] A question as to the constitutional validity of this section did not arise until the advent of *Fuentes v. Shevin*[83] and *Sniadach v. Family Finance Corp.*,[84] in which the United States Supreme Court applied the procedural due process requirements of the fourteenth amendment to the seizure of property[85] and the garnishment of wages,[86] and determined that there must be notice and a preseizure hearing.[87]

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the United States at least as early as 1842 in the case Prigg v. Commonwealth, 41 U.S. (16 Pet.) 539, 613 (1842), and was first used as a remedy by Congress in the UNIFORM SALES ACT of 1918. 82 DICK. L. REV. at 353-54.

[82] This section of the Uniform Commercial Code was incorporated in MISS. CODE ANN. § 75-9-503 (1972), which provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504 [§ 75-9-504].

It should be noted that trespass to repossess was permitted at common law only when so provided by contract, while the Uniform Commercial Code requires only that it be done without breach of the peace and so long as the security agreement does not provide otherwise. Huffmire, *Repossession Without Judicial Process: What Lies Ahead?* 15 AM. BUS. L.J. 319, 330-31 (1978).

[83] 407 U.S. 67 (1972). In *Fuentes*, the Court invalidated the Florida and Pennsylvania replevin statutes because they allowed the issuance of writs to state agents to seize property based upon an ex parte application to a court clerk. The procedures were fatally defective in that they failed to allow for notice and preseizure hearings. *Id.* at 82-83.

[84] 395 U.S. 337 (1969). In *Sniadach*, the Court held unconstitutional a Wisconsin prejudgment garnishment statute. *Id.* at 344. The Court reasoned that because of the importance of the salary to the wage earner, a deprivation of that property without a pretrial hearing would impose too great a hardship on a wage earner. *Id.* at 340.

[85] 407 U.S. at 96-97.

[86] 395 U.S. at 342-43.

[87] These decisions were somewhat eroded by Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), in which the Supreme Court examined a Louisiana statute allowing a creditor, upon a writ of sequestration, to recover household goods when a debtor defaults under an installment contract. There was neither an opportunity for a hearing nor prior notice to the buyer. *Id.* at 605-06. The Court held that the statute did not violate the fourteenth amendment's due process clause, and distinguished it from the statute found lacking in *Fuentes*. The statute in *Mitchell* required that for the writ of sequestration to be valid an affidavit must have been verified, the writ issued under bond, only in the area

Attempts to apply the logic of *Sniadach* and *Fuentes* to section 9-503 have not been successful. Although several federal district courts have declared this section unconstitutional, these holdings have been reversed.[88] Indeed, today, the great majority of jurisdictions upholds this section.[89] Generally, courts have held that self-help repossession does not amount to state action under the fourteenth amendment[90] or have held that it does not amount to state action under color of state law[91] with respect to

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where the case was located, and upon a judge's ratification. *Id.* at 616. The statute also provided for immediate dissolution by the buyer unless the seller showed sufficient grounds. *Id.* at 618. The buyer could regain the property by posting bond. *Id.* at 608.

Mitchell was later distinguished in North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), where the Court held that a Georgia statute allowing property garnishment violated the fourteenth amendment since it provided none of the protections contained in the Louisiana sequestration statute. *Id.* at 606-08.

[88] *See, e.g.,* Gibbs v. Tibleman, 369 F. Supp. 38, 42 (E.D. Pa. 1973), *rev'd,* 502 F.2d 1107 (3d Cir.), *cert. denied,* 419 U.S. 1039 (1974); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom.,* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied,* 419 U.S. 1006 (1974).

[89] *See, e.g.,* Turner v. Impala Motors, 503 F.2d 607, 609-11 (6th Cir. 1974); Gibbs v. Tibleman, 502 F.2d 1107, 1110 (3d Cir.), *cert. denied,* 419 U.S. 1039 (1974); James v. Pinnix, 495 F.2d 206, 207-09 (5th Cir. 1974); Shirely v. State Nat'l Bank, 493 F.2d 739, 740-46 (2d Cir. 1974); Bichel Optical v. Marquette Nat'l Bank, 487 F.2d 906, 907 (8th Cir. 1973).

[90] *See, e.g.,* Pease v. Havelock Nat'l Bank, 351 F. Supp. 118, 120 (D. Neb. 1972); Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672, 674-75 (W.D. Va. 1972); Kipp v. Cozens, 40 Cal. App. 3d 709, 714-15, 115 Cal. Rptr. 423, 426-27 (1974); John Deere Co. v. Calatano, 186 Colo. 101, 525 P.2d 1153, 1155-56 (1974); Giglio v. Bank of Delaware, 307 A.2d 816, 819-20 (Del. 1973); Northside Motors v. Brinkley, 282 So. 2d 617, 623-24 (Fla. 1973); Hill v. Michigan Nat'l Bank, 58 Mich. App. 430, 228 N.W.2d 407, 410 (1975); Brown v. United States Nat'l Bank, 265 Or. 234, 509 P.2d 442, 445-46 (1973); Cook v. Lilly, 208 S.E.2d 784, 785-87 (W. Va. 1974). *See generally* Huffmire, *supra* note 82, at 329 n. 41; Annot., 75 A.L.R.3d 1061 (1977); Annot., 29 A.L.R. Fed. 418, 451-58 (1976).

[91] *See, e.g.,* Gibbs v. Tibleman, 502 F.2d 1107, 1110 (3d Cir. 1974) ("under color of state law" requirement is the same as the state action requirement of the fourteenth amendment), *cert. denied,* 419 U.S. 1039 (1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365, 365-66 (5th Cir. 1974) (per curiam) (same); Bowman v. Chrysler Credit Corp., 496 F.2d 1322 (5th Cir. 1974) (per curiam) (same); James v. Pinnix, 495 F.2d 206, 207-09 (5th Cir. 1974) (defendant's conduct did not involve state action; therefore, plaintiff was not deprived of due process under color of state law). *See also* Annot., 75 A.L.R.3d 1061, 1067-69 (1977) (discussion about compliance with due process requirements); Annot., 32 A.L.R. Fed. 431, 435-88 (1977) (thorough discussion of when private person's enforcement of a lien is "under color of state law"); Annot., 29 A.L.R. Fed. 418, 458-63 (1976) ("under color of state law" under Federal Civil Rights Act in § 9-503 action).

the federal Civil Rights Act.[92] Most courts contend that section 9-503 is merely a codification of the common law and that it involves a private contractual right which does not become state action merely because the state has codified the common law.[93]

The United States Supreme Court has not yet ruled on the validity of section 9-503; however, it is likely that it would be upheld if it did.[94] Nevertheless, several commentators,[95] wary of this section's obvious bias in favor of the creditor, argue that the legislative enactment of section 9-503 is state action since the state not only approves of self-help repossession but delegates its traditional replevin authority to private individuals.[96] Attempts to invalidate the section on the basis of a state's due process clause have met the same fate as constitutional challenges at the federal level.[97]

b. *The Law in Mississippi*

The Mississippi Supreme Court recently considered this section's validity[98] in *McComb Equipment Co. v. Cooper,*[99] a case which involved the repossession of Cooper's truck by McComb Equipment by virtue of a security agreement.[100] McComb

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[92] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[93] *See* note 91 *supra.*

[94] *See* Clark, *The Foreclosing Creditor Under Article 9: Perilous Pitfalls Aplenty,* 8 U.C.C. L.J. 291, 310-11 (1976) (relying upon Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358-59 (1974), where the Court declined to hold that a public utility acted under color of state law in cutting off electric service).

[95] Huffmire, *supra* note 82; Spak, *The Constitutionality of Repossession by Secured Creditors Under Article 9-503 of the Uniform Commercial Code,* 10 HOUS. L. REV. 855 (1973).

[96] Huffmire, *supra* note 82, at 330; Spak, *supra* note 95, at 862.

[97] *See* Annot., 75 A.L.R.3d 1061, 1062-71 (1977) (traditionally violations of due process under states' constitutions have involved state action); Annot., 29 A.L.R. Fed. 418, 454-58 (1976) (no state participation found).

[98] MISS. CODE ANN. § 75-9-503 (1972).

[99] 370 So. 2d 1367 (Miss. 1979).

[100] *Id.* at 1367-68. The security agreement provided:

Equipment sold the truck and sought a deficiency judgment against Cooper.[101] The trial court ruled that the self-help repossession statute violated due process, but the supreme court reversed, upholding the statute.[102] Although the court noted that the decisions in *Sniadach* and *Fuentes* were commendable, it refused to extend due process protection to private parties' contractual remedies where they are enforced without the aid of the state.[103] The court cited *James v. Pinnix,*[104] in which the Fifth Circuit held that self-help repossession under Mississippi law does not constitute state action; therefore, no claim was stated under section 1983 of the United States Code.[105] The court in *McComb Equipment* noted that self-help repossession had existed prior to the enactment of section 75-9-503,[106] but it failed to note the distinction between the two that was pointed out in *James.*[107]

Concerning the state action question, the court held that the due process clause of the fourteenth amendment was intended to control action by "any state," not by "any person."[108] In *James* the Fifth Circuit declined to hold that this section constituted state action.[109]

> Upon default Buyer agrees upon demand to deliver the vehicle to the Seller, or the Seller may with or without legal process, and with or without previous notice or demand for performance, enter any premises wherein the vehicle may be, and take possession of the same, together with anything therein. Thereafter the Seller may, if permitted by law, retain the vehicle as its property or may sell same pursuant to the laws of Mississippi, whereupon the Buyer agrees to pay any deficiency upon demand. . . .

Id.

[101] *Id.* at 1368.

[102] *Id.* at 1367-68.

[103] *Id.* at 1368.

[104] 495 F.2d 206 (5th Cir. 1974).

[105] *Id.* at 207.

[106] 370 So. 2d at 1368.

[107] 495 F.2d at 209. "Mississippi cases did not sanction self-help repossession except when provided for in the parties' contract, whereas § 9-503 allows it even when the contract is silent on the point." *Id.*

[108] 370 So. 2d at 1368. " 'Any State,' in our opinion, does not mean 'any person,' for it is indisputably the purpose of the Fourteenth Amendment to protect the citizen from the state, not the citizen from the citizen." *Id.*

[109] 495 F.2d at 208. The appellant argued that the state action in *James* was analogous to the state action in Moore Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which the Supreme Court held that state enforcement of a liquor board regulation requiring

The troublesome nature of section 75-9-503 lies in the fact that repossession may be achieved without notice, without the opportunity for a hearing, without express contractual authorization, and with trespass.[110] Unfortunately, if the United States Supreme Court upholds the validity of section 9-503, the only alternative open would be legislative change.[111]

There is a fear that any change in section 9-503 could have an adverse effect upon low-cost financing; however, some commentators disagree.[112] Nevertheless, there can be no question that some protection must be provided for both the debtor and the creditor.[113] The issue of when the default occurs is not defined by section 9-503, which places the creditor in the position of making the determination.[114] The primary requirement embodied in section 9-503 is that the creditor not breach the peace;[115] however, it fails to define what constitutes a breach of the peace.[116]

Perhaps such inadequacies could be corrected by judicial interpretation; however, the most serious deficiencies, the lack of notice and opportunity for a hearing, appear to be resolvable only by the legislature. Even if it is constitutionally permissible to allow self-help repossession, it does not necessarily follow that such seizure in the absence of notice and a hearing is constitutionally unimpeachable. Thus, although the decision in *McComb Equipment* may be constitutionally correct, it nevertheless

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clubs to follow their constitutions amounted to state action under the fourteenth amendment when the club constitution required racial discrimination. *Id.* at 170. The Fifth Circuit declined to apply *Moose Lodge* in *James* since a higher degree of state involvement is required in the absence of racial discrimination. 495 F.2d at 208.

[110] Huffmire, *supra* note 82, at 330-31; Spak, *supra* note 95, at 862.

[111] MacDonald & Williams, *U.C.C. Article 9 Self-Help Provisions: Failure of the Constitutional Challenge, The Need for Legislative Scrutiny,* 2 OHIO N.U.L. REV. 554, 558-61 (1975).

[112] Krahmer, Clifford & Casley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study,* 4 TEX. TECH. L. REV. 23, 62 (1972).

[113] MacDonald & Williams, *supra* note 111, at 559.

[114] Huffmire, *supra* note 82, at 322-23.

[115] *Id.* at 325-26. The author notes that in the absence of legislative guidance the courts have attempted to fashion their own definition of what constitutes a breach of the peace. *Id.*

[116] MISS. CODE ANN. § 75-9-503 (1972) provides simply: "In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . ."

would be appropriate for the legislature to redefine the limits of section 75-9-503 in more concrete terms and in a manner beneficial to both the creditor and the debtor. While it is admitted that such a change will necessitate greater expense and that consumers will undoubtedly bear the brunt of that increase, it should also improve the debtor-creditor relationship by maintaining "an equitable balance between the rights of debtor and creditor."[117]

Allen Ross Morton

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[117] 370 So. 2d at 1368.

CRIMINAL LAW AND PROCEDURE

In 1979, the Mississippi Supreme Court rendered many significant decisions on the subject of criminal law and procedure. This commentary will address four major areas: sexual offenses,[1] probable cause,[2] evidence[3] and criminal procedure.[4]

I. SEXUAL OFFENSES

In the cases decided this term in the area of sexual offenses, two topics are of significant interest.

A. Rape

The crime of rape was treated in several cases. In *Kirkland v. State,*[5] the accused was indicted and convicted for the rape of his three-year-old daughter and was sentenced to life imprisonment.[6] The victim had bruises around her eye and on her chest and had a laceration and tear between her vagina and rectum.[7] The pediatric resident who examined the victim testified that the vaginal laceration could have been caused by sexual molestation or a straddle-stride injury.[8]

The supreme court held that the state had failed to prove the corpus delicti, that is, the existence of an act or result which forms the basis of the criminal charge and the existence of criminal agency as the cause of the act or result.[9] Because the state's expert witness testified that it was as reasonably probable that the child's injuries were caused by a straddle-stride injury as by sexual molestation, the court ruled that the state failed to prove that there was a real and not an imaginary crime for which the defendant was charged.[10]

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[1] *See* notes 5 through 34 and accompanying text *infra.*

[2] *See* notes 35 through 104 and accompanying text *infra.*

[3] *See* notes 105 through 211 and accompanying text *infra.*

[4] *See* notes 212 through 333 and accompanying text *infra.*

[5] 371 So. 2d 402 (Miss. 1979).

[6] *Id.*

[7] *Id.* at 403. *Cf.* White v. State, 375 So. 2d 220, 221 (Miss. 1979) (bruises on arms, legs, and around vaginal area of adult victim); Sanford v. State, 372 So. 2d 276, 277 (Miss. 1979) (dirt and abrasions on hips and buttocks and spermatozoa).

[8] 371 So. 2d at 403. There was also testimony by the child's mother and a police officer as to statements made by the child outside the presence of the defendant to the effect that the latter had molested her. *Id.* at 404.

[9] *Id.* at 404. The court also held that the testimony of the child's mother and the police officer was inadmissible as hearsay since the victim's statements as to who raped

The defense counsel's cross-examination of this witness resulted in the "just-as-reasonably-probable" point.[11] That the

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her were made outside the presence of the accused. *Id.* at 404-05 (citing Jeffries v. State, 89 Miss. 643, 647, 42 So. 801, 802 (1907), which held that it is reversible error to admit such evidence). The court also cited Redding v. State, 211 Miss. 855, 863, 53 So. 2d 7, 11 (1951), which held that the name of the accused, the time of the offenses, and the place cannot be proved "by a repetition of the words of the prosecutrix." 371 So. 2d at 405. *See also* Killingsworth v. State, 374 So. 2d 221, 223 (Miss. 1979) (where the defendant's version of what happened was just as plausible as the prosecutrix's, latter's testimony should be scrutinized with extreme caution); *see generally* Eisenberg, *Abolishing Cautionary Instructions in Sex Offense Cases: People v. Rincon-Pineda*, 12 CRIM. L. BULL. 58, 60-63, 66-72 (1976) (reviewing jury instruction to examine testimony of prosecutrix with caution); Comment, *Repeal of the Corroboration Requirement: Will It Tip the Scales of Justice?*, 24 DRAKE L. REV. 669, 674-82 (1975) (admissibility of evidence of complainant's character).

[10] 371 So. 2d at 404-05 (citing Buford v. State, 219 Miss. 683, 690, 69 So. 2d 826, 830 (1954) (proof of corpus delicti necessary to satisfy the requirement that a real and not an imaginary crime existed for which the accused was charged)). *But cf.* Horton v. State, 374 So. 2d 764, 765 (Miss. 1979) ("Under [MISS. CODE ANN. § 97-3-65(1) (Supp. 1979)] penetration of a female's private parts where the female is under 12 years of age is not a requisite element of the charge of rape when it is shown that the private parts of the female have been lacerated or torn in an attempt to have carnal knowledge of her").

There was no testimony in *Horton* that the laceration could reasonably have been caused by an act other than rape. *Cf.* Bishop v. State, 370 So. 2d 238, 239 (Miss. 1979) (where no showing of marks of violence and no testimony as to threats or use of weapon, evidence was insufficient to satisfy the mind of the guilt of accused or that prosecutrix submitted because of a reasonable apprehension of injury if she refused); Monroe v. State, 71 Miss. 196, 199, 13 So. 884, 885 (1893) (absent showing of struggle, choking or blows to disable, or tearing of the victim's clothing, conviction could not stand because of failure to satisfy the mind of the guilt of accused). *See generally* Hobey, *Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 311 (1973); Scutt, *Consent Versus Submission: Threats and the Element of Fear in Rape*, 13 U.W.A.L. REV. 52-76 (1977).

[11]
> [Question by defense:] That's why you're telling this Jury and this Court [sic] that in your opinion you cannot determine whether there was a straddle-stride injury or an attempted rape, can you?
>
> [Answer by witness:] No, sir.
>
> [Defense:] And it's just as reasonably probable that this child suffered a straddle-stride injury as it is reasonably probable that the child was a victim of an attempted rape, is that not correct, Doctor?
>
> [Answer:] From my examination.

371 So. 2d at 403-04.

state anticipated this is apparent from the questions propounded on direct examination.[12] According to the testimony of the medical expert, an internal examination was not conducted because the victim complained of soreness.[13]

B. Constitutional Considerations

In a significant case decided this term, *Tatro v. State*,[14] the court struck down Mississippi's "fondling" statute as unconstitutional. The court reasoned that since the statute applies only to male persons and not to every person,[15] the statute is clearly discriminatory, unconstitutionally denies equal protection of the law to males, and is thus void.[16] The court stated that the unequal treatment under the statute has not been shown to serve any governmental policy or to be founded on a rational distinction based on sex.[17] Though an offense under the statute could be committed against a male or a female, since only a male could be punished under the statute the court found that the legislative intent was to confine application of the statute to males only.[18] The court declined to remedy the situation by striking the word male from the statute, since to do so would create a crime judicially, an act the court may not undertake absent legislative sanction.[19] Furthermore, since the court could not cure the statute's defect and apply it retroactively, and since the statute as written was unconstitutional and void, the defendant's conviction was reversed and he was discharged.[20]

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[12] [Question by the state:] All right. Now when you talked to the defendant and when you talked to other people there, did they make any indication that she had received a straddle injury anywhere?

> [Answer:] No, sir. We asked specifically if anyone had seen her fall at any time and no one knew that she had.

Id. at 403.

[13] *Id.* That a more detailed medical examination was not possible and that the witness's testimony on cross-examination was not or perhaps could not be clarified by the prosecutor were at least indirectly responsible for the result in this case.

[14] 372 So. 2d 283, 285 (Miss. 1979).

[15] The statute provides in part:

> Any male person above the age of eighteen years, who, for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his body or any member thereof, any child under the age of fourteen years, with or without his consent, shall be guilty of a high crime . . . .

MISS. CODE ANN. § 97-5-23 (1972).

[16] 372 So. 2d at 284-85.

[17] *Id.*

[18] *Id.*

In a vigorous dissent, Justice Sugg suggested that the court simply could strike the word "male" from the statute and thereby enlarge the class of persons subject to it without creating a common law crime.[21] The dissent also pointed out that the court had in the past held that where one part of a statute is valid and another part invalid, there is a presumption that the legislature intended to enact the valid part, if such part can stand independently from the invalid part.[22] In Sugg's opinion, the valid part of the statute was independent of the word "male" and could be separated from the invalid part.[23]

Justice Sugg also stated that striking the word "male" would involve the due process and ex post facto provisions of the state and federal constitutions, but that since the defendant in the case at bar was male, the statute as it stood gave him sufficient notice.[24] Removal of the word "male" would allow the statute to apply prospectively to females.[25] Though the fondling statute as written was unconstitutional on its face, the court's action in striking down the entire statute because of the word "male" appears unnecessarily extreme. As Justice Sugg noted in his dissent, the United States Supreme Court has consistently held that one part of a statute may be struck without affecting the rest of the statute.[26] In the instant case the remainder of the statute clearly does not depend on the word "male."[27] Had the court merely removed the word "male" from the statute, the latter's validity would have remained intact.[28]

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[19] *Id.* at 285.

[20] *Id.* In Catchot v. State, 374 So. 2d 807 (Miss. 1979), decided later in the year, the defendant's conviction under the fondling statute was also reversed based on the holding in *Tatro,* but the defendant was held for further action by the grand jury on the charge of attempted rape, indecent exposure or "any other charge growing out of the facts in the record." *Id.* at 808 n.1.

[21] 372 So. 2d at 286 (Sugg, J., dissenting).

[22] *Id.* at 285 (citing several cases, among them O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1977), *cert. denied,* 435 U.S. 934 (1978), and Spears v. State, 278 So. 2d 443 (Miss. 1973)).

In *Spears,* the court held that part of the abortion statute was unconstitutional but let a conviction under the statute stand. 278 So. 2d at 446. In Spears v. Ellis, 386 F. Supp. 653 (S.D. Miss. 1974), *aff'd,* 423 U.S. 802 (1975), the abortion statute was considered by a three judge panel after the decision in *Spears v. State,* with the court holding that the remaining parts of the statute upheld in *Spears v. State* were constitutional. *Id.* at 655.

[23] 372 So. 2d at 285-86.

[24] *Id.* at 287.

[25] *Id.*

In *Davis v. State,*[29] the court had another opportunity to determine the constitutionality of a statute. There the defendant was convicted under the statute governing crimes against nature.[30] The supreme court rejected out of hand the appellant's contentions that the statute unconstitutionally discriminates against persons engaging in certain sexual practices and that the trial judge is accorded too much discretion in the imposition of punishment.[31]

Under the statute relating to crimes against nature, there is no great disparity based on the sex of the offender as there is in the "fondling" statute.[32] Additionally, the court has held that the fact that the crime is not defined more specifically does not violate due process.[33] A partial solution to the problem of defining "crimes against nature" may be found in adapting the terminology of a child exploitation statute, recently enacted by the Mississippi Legislature,[34] to the statute dealing with crimes against nature. While the new law does not directly relate to or mention the crime against nature statute, it may prove helpful to members of the state's bench and bar for the legislature to clarify further the scope of the offense under the statute by incorporating by reference the language of the child exploitation statute into the crimes against nature statute.

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[26] *Id.* at 285-86. In United States v. Jackson, 390 U.S. 570 (1968), the Court held that the invalid part may be dropped, keeping the remainder if the valid part is operative and absent a showing that the legislature would not have enacted the valid provision independently. *Id.* at 585-86. In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court held that to uphold one part of a statute but not another part, the parts must not be mutually dependent. *Id.* at 312-13.

[27] *See* note 15 *supra.*

[28] *See* 372 So. 2d at 286 (Sugg, J., dissenting).

[29] 367 So. 2d 445 (Miss. 1979).

[30] Miss. Code Ann. § 97-29-59 (1972). The statute provides that "[e]very person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years."

[31] 367 So. 2d at 446.

[32] *See* notes 15 and 30 *supra. But see* State v. Hill, 179 Miss. 732, 735, 176 So. 719, 720 (1937) (penetration of the body is essential to the offense). *See generally* Annot., 58 A.L.R.3d 636 (1974) (consent as defense to sodomy charge); Annot., 65 A.L.R.2d 748 (1959) (consent affecting assault with intent to commit unnatural sex act upon minor).

[33] State v. May, 329 So. 2d 65, 67 (Miss.), *cert. denied,* 429 U.S. 864 (1976).

[34] Miss. Code Ann. § 97-5-31 (Supp. 1979). The statute is designed to provide for

II. PROBABLE CAUSE

Probable cause for arrest was defined in 1964 by the United States Supreme Court in *Beck v. Ohio*.[35] It was unclear after *Beck,* however, whether the same standard necessary for a valid arrest without a warrant was applicable to what had come to be known as an investigatory stop or stop and frisk situation.[36] At that time, the federal courts were split on the validity of a stop and frisk based on a standard less than the probable cause necessary for arrest, and courts holding such activity invalid were, in effect, refusing to recognize the stop and frisk concept.[37] One argument advanced in favor of a lesser standard for investigatory stops suggested that since the consequences of arrest are not present when a person is merely temporarily detained, such a stop is not a "seizure" in the constitutional sense; or if it is a "seizure" it is of less consequence than an arrest, and a less stringent standard than that of probable cause should be

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criminal sanctions against the sexual exploitation of children. It defines sodomy as "contact between the penis and the anus, the mouth and the penis, the mouth and the vulva, or the mouth and the anus."

[35] 379 U.S. 89 (1964). The Court defined probable cause as "whether at that moment the facts and circumstances within their [the officers'] knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Id.* at 91.

[36] *See* Comment, *Stop and Frisk: Dilemma for the Court,* 41 S. CAL. L. REV. 161, 163 (1967) (pointing out this situation and the dilemma it presented for the courts).

[37] *Id.* at 164. For a typical statement of the rationale for holding such brief detention invalid in an automobile stop, see Henry v. United States, 361 U.S. 98, 103-04 (1959). Such brief stops, however, had been held valid in some jurisdictions, although probable cause for arrest was not present. *See, e.g.,* Gilbert v. United States, 366 F.2d 923, 928 (9th Cir. 1966) (upholding detention if under the totality of the circumstances, it is reasonable and not arbitrary or capricious), *cert. denied,* 393 U.S. 985 (1968); Kenningham v. United States, 307 F.2d 632, 633 (2d Cir. 1962) (circumstances warranted officer's making inquiry).

applied.[38]

In apparent response to these arguments the United States Supreme Court in 1968 held, in *Terry v. Ohio,*[39] that such a stop was indeed a "seizure" for constitutional purposes.[40] However, the Court upheld a frisk-type search incident to an investigative stop where the police officer was able to point to specific and articulable facts which, with inferences naturally arising from those facts, reasonably warranted such a search.[41] *Terry* and its companion cases have been read as authorizing the police to detain individuals on less than probable cause when those individuals are suspected of either engaging in or preparing to engage in criminal activity.[42] Four years after its decision in *Terry,* the Supreme Court again addressed the validity of an investigatory stop on less than probable cause in *Adams v. Williams.*[43] The Court reaffirmed its stance, implicit in *Terry,* that an investigatory stop does not require application of the strict probable cause standard necessary to arrest.[44] Though *Terry* had established a two-part standard for determining the validity of a stop and frisk—whether the officer reasonably believes that criminal activity is afoot and whether he believes that the suspect is armed and dangerous—*Adams* adopted only the first half of that test as the standard for a valid stop.[45]

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[38] Comment, *supra* note 36, at 167.

[39] 392 U.S. 1 (1968). Two companion cases to *Terry,* decided together, were Sibron v. New York and Peters v. New York, 392 U.S. 40 (1968). For a general discussion of the three cases and the Supreme Court's opinion, see LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond,* 67 MICH. L. REV. 40, 47-50 (1968).

[40] 392 U.S. at 16.

[41] *Id.* at 21. In making a determination of the reasonableness of the officer's actions in light of the circumstances, the courts must look not to an unspecified inclination, but to specific inferences which reasonably may be drawn from those circumstances in light of the officer's experience. *Id.* at 27.

[42] Caracappa, *Terry v. Ohio and the Power of Police to Accost Citizens Absent Probable Cause to Arrest,* 16 DUQ. L. REV. 499, 499 (1977).

[43] 407 U.S. 143 (1972). It should be noted that *Adams,* like *Terry,* involved both an investigatory stop and a frisk.

[44] The Court stated:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Id. at 145-46 (citing Gaines v. Craven, 448 F.2d 1236 (9th Cir. 1971) and United States v. Unverzagt, 424 F.2d 396 (8th Cir. 1970)).

Although cases decided by the Mississippi Supreme Court before *Terry* and *Adams* required probable cause even in situations falling under the heading of investigatory stops,[46] since these two major cases were decided the Mississippi rule apparently has been that an officer may stop and detain someone without knowledge sufficient to justify an arrest when, under the circumstances, such detention is reasonable and its purpose is the resolution of an ambiguous situation.[47] In its 1977 decision in *Green v. State,*[48] noting that the Supreme Court has never articulated the standard necessary for an investigatory stop, the Mississippi Supreme Court, rather than supplying a standard, concluded that this is a proper subject for case by case determination.[49] In the same case the court indicated that knowledge of criminal activity is not a prerequisite to an investigatory stop, but that reasonable grounds for such a stop may be provided by the circumstances.[50]

Although the court noted in *Green* that it had never established a specific standard for an investigatory stop,[51] at least one earlier case[52] indicates that the court had adopted the *Terry* standard of "specific and articulable facts."[53] Only one year later, however, the court's opinion in *Keys v. State*[54] signalled some confusion over the standards delineated in *Terry*.[55] From the language used, it appears that the court was equating the standard necessary for an investigatory stop with that of probable cause for arrest, holding a stop and subsequent frisk invalid because no probable cause for arrest existed.[56]

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[45] *See* Caracappa, *supra* note 42, at 505-06 (analyzing the implications of the holdings in *Terry* and *Adams*).

[46] *See, e.g.,* Bradshaw v. State, 192 So. 2d 387, 388 (Miss. 1966) (stop and subsequent arrest upheld because officer had reasonable cause to believe that a felony had been committed and reasonable cause to believe that the defendant had committed it), *cert. denied,* 389 U.S. 941 (1967).

[47] *See* Griffin v. State, 339 So. 2d 550, 553 (Miss. 1976) (stop based on shopowner's information regarding defendant's suspicious behavior while in her store and on street in front of store); Chapman v. State, 284 So. 2d 525, 527 (Miss. 1973) (after stopping defendants for speeding violation, when it became apparent to the officer from information he had received that they may have committed another crime, officer had duty to detain them).

[48] 348 So. 2d 428 (Miss. 1977).

[49] *Id.* at 429. In *Green,* a police radio broadcast furnished officers with sufficient information under the circumstances to stop the defendant for investigation. *Id.*

[50] *Id.* at 430 (citing United States v. Walling, 486 F.2d 229, 235-36 (9th Cir. 1973)(upholding stop of automobile late at night on country road used in the past for certain criminal activities), *cert. denied,* 415 U.S. 923 (1974)). *See* United States v. McDaniel, 550 F.2d 214, 217 (5th Cir. 1977) (citing *Terry* and other cases as supporting right of officer to stop individual if the officer reasonably suspects that individual is involved in a crime).

Any confusion, however, was cleared up in 1975 by the leading case in this area, *Singletary v. State*.[57] Noting that policemen have a duty to be alert to and, within limits, to investigate suspicious circumstances,[58] the court defined three levels of police activity, each with different standards: (1) voluntary conversation without force and detention,[59] (2) investigative stop and temporary detention,[60] and (3) arrest.[61] This breakdown conforms with that generally read into *Terry* and subsequent United States Supreme Court cases.[62]

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[51] 348 So. 2d at 429.

[52] Griffin v. State, 260 So. 2d 839 (Miss. 1972).

[53] *Id.* at 841. A police officer, checking his mail late at night, discovered some opened postal boxes and saw defendant, carrying items in his hands, running away. The officer stopped the defendant and later arrested him. *Id.* at 840. On appeal, the court held that this situation clearly falls within *Terry*, citing the "specific and articulable facts" test. *Id.* at 841.

[54] 283 So. 2d 919 (Miss. 1973).

[55] *Id.* at 920. Officers, after observing the defendant leaving his home, stopped the defendant's automobile to serve a warrant authorizing a search of his home. *Id.*

[56] *Id.* at 921. The court stated:

> These cases, however, do not mean that the officers have authority to "stop and frisk" without probable cause for arrest. The authority to search an individual is based upon the authority of the officer to arrest the defendant. If the officer does not have the authority to make an arrest, he has no right to search the individual. Moreover, if he had no authority to arrest the defendant, evidence obtained by an illegal search cannot be used against the person illegally searched.

Id. (citations omitted).

[57] 318 So. 2d 873 (Miss. 1975).

[58] *Id.* at 876. *See* Warren v. State, 369 So. 2d 483, 484-85 (Miss. 1979) (officer's stop of defendant, whose shirt was dripping with blood, was investigatory stop that alert police officer would make under similar circumstances, and defendant's clothes were admissible as evidence); *accord,* United States v. Allen, 472 F.2d 145, 147 (5th Cir. 1973) (policemen would have been derelict in their duty had they not investigated suspicious circumstances, although they did not have probable cause for arrest); United States v. West, 460 F.2d 374, 375-76 (5th Cir. 1972) (police officer had duty to investigate upon answering police call and finding car with trappings of a police vehicle in a ditch); Frye v. United States, 315 F.2d 491, 494 (9th Cir. 1963) (police officer has duty to investigate in his role as guardian of the public peace).

Nevertheless, it appears that confusion may again be introduced into this area with the court's language in *Anderson v. State,*[63] a 1979 decision. In *Anderson,* a police officer stopped defendants' vehicle after having received a description over his radio matching that of the defendants and the vehicle, indicating involvement of the described persons and vehicle in an armed robbery.[64] A gun battle ensued, leaving the officer seriously wounded.[65] The confusion may result from the language of the court's opinion rather than from the holding, as evidenced by the court's statement of the issue.[66] After citing the Mississippi definition of probable cause for arrest,[67] the court proceeded to discuss the standards for an investigatory stop.[68] The opinion concluded with the remark that the police communication was sufficient justification for an investigative stop, "equating with probable cause."[69]

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[59] "An officer may approach a person for the purpose of engaging in a voluntary conversation no matter what facts are known to the officer since it involves no force and no detention of the person interviewed. . . ." 318 So. 2d at 876.

[60] "To stop and temporarily detain is not an arrest, and the cases hold that given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest. . . ." *Id.*

[61] The standard for an arrest is, of course, probable cause. *See* note 35 and accompanying text *supra.*

[62] Caracappa, *supra* note 42, at 503.

[63] 368 So. 2d 243 (Miss. 1979).

[64] *Id.* at 244.

[65] *Id.*

[66] The court used interchangeably the terms generally applied to an investigatory stop and those applied to an arrest: "The issue is whether officer Kelly had *probable cause* to stop the appellants for *investigation.*" *Id.* (emphasis added).

[67] *Id.* (citing Powe v. State, 235 So. 2d 920, 923 (Miss. 1970) (probable cause is less than evidence necessary for condemnation, but more than mere suspicion)). In 1979, the Mississippi Supreme Court rendered several decisions concerning what constitutes probable cause, the determination of its existence, and the consequences of arrest without probable cause. *See* Buford v. State, 372 So. 2d 254, 256 (Miss. 1979) (blood on seat of car driven by defendant together with information from police radio broadcast constituted probable cause to arrest defendant); Beard v. State, 369 So. 2d 769, 772 (Miss. 1979) (adversarial safeguards of confrontation, cross-examination, and right to counsel are not necessary in preliminary hearing to determine existence of probable cause); Gardner v. State, 368 So. 2d 245, 248 (Miss. 1979) (arrest without probable cause gives citizen a limited right to resist, but not liberty to engage in indiscriminate and violent resistance).

[68] 368 So. 2d at 244-45. The court quoted with approval the portions of *Singletary*

Other decisions of the court this term confirm that a police broadcast may form a sufficient basis for probable cause to arrest.[70] From the facts in *Anderson,* it appears that probable cause existed for an arrest at the time the officer stopped defendants' automobile.[71] Since the standard for probable cause to make an arrest is higher than the reasonable circumstances which may justify an investigative stop and temporary detention,[72] the court is certainly correct in concluding that the radio broadcast was sufficient to justify such a stop.[73] Nonetheless, the language of the opinion tends to obfuscate the distinction between the two standards,[74] as previously set out in *Singletary.*[75] Rather than adding confusion to an already blurred area, the court should return to the more clear-cut distinctions between the standards for an arrest and an investigative stop.

In a related area, the Mississippi Supreme Court in 1979 handed down *Miller v. State,*[76] its first decision concerning the validity of roadblock stops since the United States Supreme Court's ruling in *Delaware v. Prouse.*[77] *Prouse* addressed the constitutionality of random stops of automobiles when the of-

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in which *Terry* and *Adams* were cited, but made no mention of that portion of the opinion delineating the three areas of police activity. *Id.*

[69] *Id.* at 245.

[70] *See* Covan v. State, 374 So. 2d 833, 837 (Miss. 1979) (official information received from a police radio broadcast may form the basis of probable cause for arrest); Buford v. State, 372 So.2d 254, 256 (Miss. 1979) (combination of information from police broadcast and blood on the seat of defendant's car constituted probable cause for arrest); Hamburg v. State, 248 So. 2d 430, 431-32 (Miss. 1971) (description over radio of automobile without license tag as having been involved in drug sale gave officers probable cause to stop vehicle matching that description).

[71] 368 So. 2d at 244. On information telephoned to them by the Warren County Sheriff's office, the Leland Police Department had issued a radio bulletin giving detailed descriptions of the suspects and their automobile and stating that a warrant for their arrest had been issued. *Id.*

[72] *See* notes 60, 61 and accompanying text *supra.*

[73] 368 So. 2d at 244-45.

[74] *See* notes 66 through 69 and accompanying text *supra.*

[75] *See* notes 60, 61 and accompanying text *supra.*

[76] 373 So. 2d 1004 (Miss. 1979).

[77] 440 U.S. 648 (1979).

ficer making the stop has observed neither traffic violations nor suspicious activity.[78] The Court noted that certiorari had been granted to rectify a split in authority among the federal courts.[79] While at least five jurisdictions had held this type of stop violative of the fourth and fourteenth amendments,[80] six others had upheld the same type of activity.[81] Relying on its earlier decisions,[82] the Court held that random stops for checking licenses or registration are unreasonable under the fourth amendment where no articulable suspicion of illegal conduct exists, but suggested roadblocks as a constitutionally acceptable alternative.[83]

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[78] *Id.* at 650.

[79] *Id.* at 651.

[80] *See* United States v. Montgomery, 561 F.2d 875, 879 (D.C. Cir. 1977) (officer must have specific articulable facts to stop vehicles for questioning of the occupants); United States v. Nicholas, 448 F.2d 622, 624-25 (8th Cir. 1971) (initial momentary detainment of citizen in parked automobile with out-of-state license plates held impermissible); State v. Ochoa, 23 Ariz. App. 510, 534 P.2d 441, 444-45 (1975) (forced stops of motor vehicles permissible only where there is reasonable suspicion by the officer); People v. Ingle, 36 N.Y.2d 413, 419, 330 N.E.2d 39, 43, 369 N.Y.S. 69, 73 (1975) (balancing of interests of state and individual citizens requires eliminating arbitrariness in stopping of motor vehicles on highways for inspection purposes); Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875, 879 (1973) (officer must have probable cause based on specific facts to believe that either driver or vehicle is in violation of motor vehicle laws before making the stop).

[81] *See* United States v. Jenkins, 528 F.2d 713, 714-15 (10th Cir. 1975) (upholding routine stop although patrolman had noticed nothing unusual or suspicious about the vehicle); Myricks v. United States, 370 F.2d 901, 904 (5th Cir.) (momentary stops of motor vehicles for road checks are reasonable and acceptable), *cert. dismissed,* 386 U.S. 1015 (1967); Palmores v. State, 290 A.2d 573, 582-83 (D.C. 1972) (rejecting contention that spot checks for licenses and registration can occur only when officer has articulable suspicion); State v. Holmberg, 194 Neb. 337, 231 N.W.2d 672, 678 (1975) (balancing governmental interest with interest of individual, stops for road checks are acceptable); State v. Allen, 282 N.C. 503, 194 S.E.2d 9, 15 (1973) (upholding constitutionality of state statute allowing stops of motor vehicles to determine whether operated in violation of traffic laws); Leonard v. State, 496 S.W.2d 576, 577-78 (Tex. Crim. App. 1973) (upholding stops for driver's license checks under Texas statute).

[82] *See, e.g.,* United States v. Martinez-Fuerte, 428 U.S. 543, 557-58 (1976) (upholding checkpoint stops at the Mexican-American border where all vehicles were temporarily detained, with some being sent to another area for secondary inspection); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (analogizing the roving patrol stop to an on-the-street stop and frisk, and holding that specific articulable facts are necessary for a roving patrol stop except at the border or its functional equivalent). It should be noted that the Court in *Brignoni-Ponce* did not address the question of the power of state and local officers to conduct limited stops for the enforcement of local licensing and registration laws. *Id.* at 883 n.8.

[83] 440 U.S. at 663. The Court stated that:

> except in those situations in which there is at least articulable and reasonable

In *Miller*, officers had set up a license-check roadblock in the early morning hours[84] in response to complaints that late shift employees of a nearby factory were driving without licenses.[85] Defendant's vehicle was stopped and a subsequent search, based on the officers' detection of a marijuana odor emanating from the vehicle, uncovered drugs within the vehicle.[86] Distinguishing the stop in *Miller* from the one deemed invalid in *Prouse,* the court upheld the constitutionality of license-check roadblocks where all oncoming traffic is stopped.[87] The holding in *Miller* is consistent in every way with the standards enunciated in *Prouse.*[88]

A more troublesome aspect of the *Miller* opinion, however, is the issue of probable cause to search the vehicle after a valid stop. One officer testified that he had smelled burned marijuana inside defendant's vehicle, while another stated that he had smelled both burned and raw marijuana inside the vehicle.[89] The subsequent search uncovered thirteen small plastic bags of marijuana contained in a larger plastic bag, all of which were in a purse.[90] The court held that, under these facts, the officers had probable cause to search the vehicle.[91]

In some instances distinctive odors have served as the basis

> suspicion . . ., stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude . . . States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.

Id.

[84] 373 So. 2d at 1005.

[85] *Id.* at 1004-05.

[86] *Id.* at 1005.

[87] *Id.*

[88] A stop of this type, as pointed out by the *Prouse* Court, is permissible since the discretion of officers in determining which vehicles to stop is eliminated; the arbitrary nature of random stops and spot checks, on the other hand, renders them invalid under the fourth amendment. *See* note 83 and accompanying text *supra.*

[89] 373 So. 2d at 1006. Both officers had experience in narcotics investigation. *Id.* The second officer had extensive experience and could detect marijuana odors in both the burned and raw forms. *Id.*

[90] *Id.*

[91] *Id.* at 1008.

of probable cause.[92] The United States Supreme Court has acknowledged that an officer's detection of a distinctive odor may provide the requisite probable cause for the issuance of a search warrant[93] and has also indicated that such odors may provide probable cause for a warrantless search, given exigent circumstances.[94] The Court of Appeals for the Fifth Circuit has ruled that the odor of unburned marijuana emanating from a vehicle may constitute probable cause for the search of that vehicle.[95] Though the same conclusion has been reached in other courts, both federal[96] and state,[97] it is noteworthy that several cases have drawn a distinction between motor vehicles and dwellings.[98]

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[92] For a limited discussion of probable cause to search arising from the detection of certain distinctive odors, see Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317, 324-25 (1971).

[93] *See* United States v. Ventresca, 380 U.S. 102, 111 (1965) (smell of fermenting mash, along with other circumstantial evidence, provided sufficient probable cause for issuance of search warrant for house); Johnson v. United States, 333 U.S. 10, 13 (1948) (officer's detection of odor of burning opium in hallway might have been sufficient probable cause for issuance of search warrant for defendant's apartment had officer sought such warrant).

[94] In Johnson v. United States, 333 U.S. 10 (1948), which held invalid a warrantless search of defendant's apartment based on the smell of burning opium in the hallway, the Court stated that:

> [t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. *The search was of permanent premises, not of a movable vehicle.*

Id. at 14-15. (emphasis added). In later decisions the Court expressly recognized that greater justification is required for warrantless intrusions into the privacy of a home than into automobiles. Cooper v. California, 386 U.S. 58, 59 (1967); Preston v. United States, 376 U.S. 364, 366-67 (1964).

[95] *See* United States v. Andrade, 545 F.2d 1032, 1033 (5th Cir. 1977) (in border patrol stops, the odor of marijuana emanating from defendants' vehicle gave officials probable cause to detain and search the vehicle); United States v. Barnard, 553 F.2d 389, 391 (5th Cir. 1977) (after initial stop of vehicle, odor of unburned marijuana coming from trunk furnished probable cause to search trunk).

[96] *See, e.g.*, United States v. Stricklin, 534 F.2d 1386, 1389 (10th Cir. 1976) (search of U-Haul trailer justified on ground that officer smelled marijuana at rear of trailer, although odor of marijuana will not provide probable cause when an otherwise unjustified search is already in progress).

[97] *See* State v. Houlf, 27 Ariz. App. 633, 557 P.2d 565, 568-69 (1976) (smell of marijuana from parked vehicle gave officers probable cause to search the vehicle); Mattson v.

In Mississippi, the supreme court long ago decided that the odor of liquor coming from an automobile furnished probable cause to search the automobile.[99] *Miller* extends that holding to searches of vehicles when there is testimony that the officers smelled either burned or raw marijuana in the car.[100] Other courts have refused to hold that the odor of burned marijuana gives officers probable cause to search a vehicle, since the aroma may linger for hours or days, and thus is not conclusive of the fact that marijuana is present in the vehicle at the time of the search.[101] As pointed out in a dissent to *Miller*, police officers may be able to smell raw marijuana, though it is wrapped in several layers of plastic,[102] but it seems inadvisable to permit a person's constitutional guarantees to hinge on an officer's ability to detect the odor of well-wrapped raw marijuana or to determine the freshness of an odor of burned marijuana. As the dis-

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State, 328 So. 2d 246, 247-48 (Fla. App. 1976) (probable cause to search vehicle existed after officer unlocked vehicle to take it to police station and smelled marijuana); People v. Maier, 47 App. Div. 2d 344, 366 N.Y.S.2d 660, 662-63 (1975) (officer's detection of unmistakable odor of marijuana coming from rear of van gave him probable cause to search); Commonwealth v. Stoner, 236 Pa. Super. 161, 344 A.2d 633, 635-36 (1975) (application of "plain smell doctrine," according to which odor may establish sufficient probable cause for search of a movable vehicle).

[98] *See* Britton v. State, 336 So. 2d 663, 664-65 (Fla. App. 1976) (arrest and search predicated solely on odor of burning marijuana drifting from open mobile home window held invalid); *cf.* United States v. Connolly, 479 F.2d 930, 936 (9th Cir. 1973) ("Even certain knowledge that contraband is within a dwelling does not constitute probable cause to arrest whoever happens to be inside.").

[99] *See* Eady v. State, 153 Miss. 691, 696, 121 So. 293, 294 (1929) (odor of whiskey emanating from car, taken together with the occupants' demeanor when asked about the car's apparent heaviness, constituted probable cause).

[100] 373 So. 2d at 1006-08. *See* notes 89 through 91 and accompanying text *supra.*

[101] For instance, in People v. Hilber, 403 Mich. 312, 269 N.W.2d 159 (1978), the court held that an officer's detection of a "strong" smell of burned marijuana did not justify a search of a vehicle since "[a] persistent automobile odor may be strong and appear to be recent although it has lingered for hours, days, or even longer." 269 N.W.2d at 163-64. *But see* McGowan v. State, 351 So. 2d 116, 117 (Fla. App. 1977) (when policeman trained to recognize odor of marijuana detected that odor in automobile parked in secluded area, he had probable cause to search); Berry v. State, 316 So. 2d 72, 73 (Fla. App. 1975) (when officer noticed odor of burned marijuana wafting from car parked on road in area of widespread marijuana use, he had probable cause to search).

[102] 373 So. 2d at 1010 (Patterson, C.J., dissenting).

senting opinion aptly stated, mere "fishing expeditions" should not be sanctioned by the court,[103] and "the constitutional guaranties should not be eroded by an officer's ability to smell."[104]

III. EVIDENCE

A. Competency of Witnesses

1. Competency of Spouse

The Mississippi Supreme Court dealt with the problem of the competency of a spouse to testify in *Tapp v. State.*[105] Tapp was convicted of murdering his wife's child and sentenced to life imprisonment as a result of a second trial ordered by the court after it reversed his conviction of manslaughter in a prior trial.[106] The reversal had been based on the trial court's forcing the defendant's wife to testify for the state against her will.[107] Subsequent to the first trial, the defendant and his wife were divorced, and she voluntarily testified against him at his second trial.[108]

The court affirmed the conviction but remanded the case for sentencing not to exceed the maximum penalty for manslaughter.[109] The court's action was attributable to the double jeopardy dilemma presented by Tapp's having been tried a second time for murder where his first trial had resulted in a conviction of manslaughter only.[110]

Discussing the problem of the wife's competency to testify against her husband for a crime involving personal violence against her child, Chief Justice Patterson, in his dissent,[111] pointed out that recent decisions of the court[112] had created an anomalous situation in which the admissibility of such testimony turned on the spouse's willingness or unwillingness to testify.[113] The dissent then advanced the proposition that if there were a third trial in the instant case, nothing would prevent the wife and defendant from remarrying, with the admissibility of her testimony again contingent upon her willingness to testify.[114] The Chief Justice suggested that the court re-examine its prior decisions in this area so that a spouse would be either competent or incompetent to testify against the other spouse in a child abuse or homicide case.[115]

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[103] *Id.* (citing Simmons v. State, 301 So. 2d 565, 571 (Miss. 1974) (Patterson, C.J., dissenting)).

[104] 373 So. 2d at 1010-11.

[105] 373 So. 2d 1029 (Miss. 1979).

[106] Tapp v. State, 347 So. 2d 974 (Miss. 1977).

[107] 373 So. 2d at 1030.

[108] *Id.*

[109] *Id.* at 1032. The court concluded that the limitation of the sentence was correct since a properly instructed jury in a murder trial could find a defendant guilty of the lesser crime of manslaughter and since there was ample evidence to support the jury's verdict finding the defendant guilty of murder. *Id.* at 1031-32.

[110] *Id.*

[111] *Id.* at 1032 (Patterson, C.J., and Broom, J., dissenting).

Chief Justice Patterson's concern for the rights of criminal defendants is obvious; his criticism of the court's position on the competency of a spouse, however, is well taken. It would be a considerable aid to the bench and bar in this state to have as clear a rule as possible on this matter. As the Chief Justice pointed out, the potential for abuse through the manipulation of marriage and divorce is all too evident.

2. Requirement of Corroboration

There were several cases this term concerning the requirement of corroboration of the testimony of an accomplice or a victim in the criminal context. The most significant of these for several reasons was *Jones v. State.*[116]

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[112] *See* Tapp v. State, 347 So. 2d 974, 976-77 (Miss. 1977) (trial court erred in compelling wife, who was still married to defendant, to testify); Merritt v. State, 339 So. 2d 1366, 1370 (Miss. 1976) (wife still married to husband held competent to testify against him for alleged crime involving personal violence against their child).

[113] 373 So. 2d at 1033. *See generally* Gunn, *Witnesses,* 48 Miss. L.J. 1059, 1061 (1977) (where only one spouse is a party, other spouse cannot testify without consent of both); Note, *Evidence—Witnesses—Competence and Compellability of Spouse,* 11 Melb. U.L. Rev. 272, 272-77 (1977) (spouse can elect to testify in criminal trial of other spouse).

[114] 373 So. 2d at 1032-33.

[115] *Id.* at 1033. *See generally* Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman,* 1975 Duke L.J. 45, 48-49 (criticism of the marital-confidentiality privilege established by Fed. R. Evid. 505 in light of the narrow privilege accorded in proceedings where one spouse is a criminal defendant); Comment, *Husband-Wife Evidentiary Privileges: The Power of the Federal Courts to Seek a Rational Solution,* 17 St. Louis U.L.J. 107, 108-11, 115-19, 120-23 (1973) (history of and rationale for the marital-confidentiality privilege, noting that the single exception to the absolute disqualification rule is necessity).

In the instant case the court overturned the defendant's conviction of grand larceny because the evidence against him was largely based upon the substantially uncorroborated testimony of an accomplice.[117] A disinterested witness placed the defendant elsewhere at the time of the crime.[118] Furthermore, where corroboration existed, it was corroboration of acts of the accomplice, a convicted felon awaiting sentence.[119]

B. *Inflammatory and Prejudicial Evidence*

Several cases this term again point out the balancing that is required when a trial court must decide whether proferred evidence is sufficiently inflammatory or prejudicial as to outweigh any probative value it might have.

In *Overstreet v. State,*[120] the defendant was indicted for and convicted of murder, and sentenced to life imprisonment.[121] The court, affirming the conviction, held that although the introduction of the bloody clothing of the victim was irrelevant and inflammatory, it was a harmless error where other evidence and testimony were ample to show the guilt of the accused.[122]

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[116] 368 So. 2d 1265 (Miss. 1979).

[117] *Id.* at 1265. *See generally* Heydon, *The Corroboration of Accomplices,* 1973 CRIM. L. REV. 264, 265-66, 270-81 (review of accomplice evidence rules in common law countries with special emphasis on the rules in England); Comment, *Repeal of the Corroboration Requirement: Will It Tip the Scales of Justice?*, 24 DRAKE L. REV. 669, 674-82 (1975) (discussion of the history of the corroboration requirement in view of statutory repeal and establishment of character evidence safeguards).

[118] 368 So. 2d at 1266.

[119] *Id.* The only corroborative testimony linking Jones to the crime was that of a witness who allegedly saw the defendant at night in a dim light and who recognized the latter only after the police took the witness to Jones' place of business for the purpose of identification. *Id.* The Mississippi Supreme Court has stated that an accused may be convicted on the uncorroborated testimony of an accomplice, but that such testimony must be reasonable and viewed with great caution and suspicion. *See* Moody v. State, 371 S. 2d 408, 410 (Miss. 1979); Simpson v. State, 366 So. 2d 1085, 1086 (Miss. 1979). *See generally* Comment, *Mandatory Exclusion of Identifications Resulting from Suggestive Confrontations: A Conceptual Alternative to the Independent Basis Test,* 53 B.U.L. REV. 433, 440, 448, 449-52 (1973).

[120] 369 So. 2d 275 (Miss. 1979).

[121] *Id.* at 276.

[122] *Id.* at 277. Furthermore, the district attorney's conduct concerning defense counsel's questioning of a witness was properly handled by the trial judge and was not preju-

Though the introduction of inflammatory evidence is presumptively reversible error, the presumption may be rebutted where it can be said with confidence that no harmful effect resulted.[123] Relevancy of the evidence is also a factor in balancing its probative value against its inflammatory nature.[124]

Several cases this term dealt with the prejudicial effect of evidence of prior criminal acts or convictions. In *Page v. State,*[125] the defendant was convicted of armed robbery. At trial, evidence of the victim's having been shot and stabbed was admitted.[126] The court reasoned that where evidence of a second crime forms part of the same transaction of which the crime charged is constituted, and is so intimately connected with it that one cannot be proved without some proof of the other, the evidence is admissible.[127]

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dicial to the defendant. *Id. See also* Horton v. State, 374 So. 2d 964, 965 (Miss. 1979) (admitting underpants of rape victim to show evidence of dried blood, though inflammatory, was harmless error in view of other testimony as to origin of blood).

[123] 369 So. 2d at 277 (citing Tudor v. State, 299 So. 2d 682 (Miss. 1974)); *see* Berry v. State, 374 So. 2d 227, 229 (Miss. 1979) (where the defendant's guilt was so obvious that a fair jury could only have returned a verdict of guilty, potentially inflammatory statements made by the prosecuting attorney in closing argument did not compel reversal).

[124] 369 So. 2d at 277 (citing Voyles v. State, 362 So. 2d 1236, 1242 (Miss. 1978)); *see, e.g.,* Gray v. State, 375 So. 2d 994, 1000 (Miss. 1979) (admission of photos of victim's body); Beard v. State, 369 So. 2d 769, 771 (Miss. 1979) (upholding admission of evidence that victim had her back to defendant and was holding their baby at the time she was shot); Sloan v. State, 368 So. 2d 228, 229 (Miss. 1979) (bloody trousers had some probative value, and their admissibility was within the trial judge's discretion). In Hogan v. State, 366 So. 2d 1089 (Miss. 1979), photographs revealing the victim's bullet wounds were deemed to be admissible evidence. Additionally, testimonial evidence as to the circumstances of the shooting and the number of shots fired was admitted. *Id.* at 1091. The court held that although the photographs were of limited evidentiary value, their introduction was not so prejudicial as to warrant reversal. *Id.* The court also pointed out that the defense counsel's objection to the photographs actually was aimed at testimony relating to the pictures rather than at the photographs themselves. *Id.*

[125] 369 So. 2d 757 (Miss. 1979).

[126] *Id.* at 759.

[127] *Id.* at 761 (citing Brooks v. State, 242 So. 2d 865, 869 (Miss. 1971)). *See* Gray v. State, 375 So. 2d 994, 1000 (Miss. 1979) (similar holding—res gestae); *cf.* Whittington v. State, 377 So. 2d 927, 928 (Miss. 1979) (previous threat by defendant is admissible where it is directly related to crime in issue and establishes motive).

The Mississippi Uniform Criminal Rules of Circuit Court Practice, adopted by the Mississippi Supreme Court on August 15, 1979, and particularly rule 6.04, require a two-stage trial in which evidence of prior convictions is inadmissible during the trial on the principal charge, except for purposes of impeachment. Mississippi Uniform Criminal

In *Davis v. State*,[128] the defendant was indicted and convicted of forgery.[129] On direct examination of a witness who aided in committing the forgery, the state asked the witness why she had helped Davis.[130] The response of the witness concerned appellant's prior criminal record.[131] The trial court sustained defense counsel's objection to the testimony, admonished the jury to disregard it, but overruled a motion for mistrial.[132]

The supreme court concluded that responses of the prosecution's witness on direct examination which brought to light the prior criminal convictions and activities of the defendant were sufficiently prejudicial to warrant a mistrial.[133]

Additionally, in *Samuels v. State*,[134] the court reaffirmed Mississippi's impeachment rules in holding that, for the purpose of impeachment, a witness on cross-examination may be asked about prior convictions and about a statement given to a police officer prior to trial if the testimony in court is completely inconsistent with the prior statement.[135]

Rules of Circuit Court Practice, Rule 6.04(2) (1979), *quoted and discussed in* Davis v. State, 377 So. 2d 1076, 1079 (Miss. 1979) and Usry v. State, 378 So. 2d 635, 638 (Miss. 1979). *See* notes 186 through 192 and accompanying text *infra*. However, where the evidence is totally unrelated to the offense charged, it is inadmissible. Killingsworth v. State, 374 So. 2d 221, 223 (Miss. 1979).

[128] 374 So. 2d 1293 (Miss. 1979).

[129] *Id.*

[130] *Id.* at 1294.

[131] *Id. See* Bennett v. State, 374 So. 2d 803, 806 (Miss. 1979) (witness's reference to gun does not necessarily give rise to an inference of other criminal activity by defendant sufficient to be prejudicial error).

[132] 374 So. 2d at 1294-95. Davis' attorney had previously referred to the defendant's prior convictions during voir dire. *Id.*

[133] *Id.* at 1294. Where the voluntary statement of a witness concerning prior criminal activity of the defendant was promptly objected to and the jury was directed to disregard the statement, it is presumed that the jury followed the directions of the trial judge. Gray v. State, 375 So. 2d 994, 1002 (Miss. 1979). *Cf.* McCormick v. State, 377 So. 2d 1070, 1071 (Miss. 1979) (where there is evidence both that witnesses' dislike for defendant spurred their filing of charges against him and that witnesses had past convictions for similar crime, it is the jury's responsibility to judge the witnesses' credibility and to weigh their testimony accordingly).

[134] 371 So. 2d 394 (Miss. 1979).

[135] *Id.* at 396. *See* Parker v. State, 367 So. 2d 456, 457 (Miss. 1979) (testimony by officer as to what co-defendant told officer is admissible against a defendant for impeachment purposes). *But cf.* Seller v. State, 374 So. 2d 781, 783 (Miss. 1979) (reaffirming the holding in Williams v. State, 330 So. 2d 272, 276 (Miss. 1976) that inculpatory statements made by defendant to a court-appointed psychiatrist are inadmissible).

As to statements made by a co-defendant, *Langston v. State*[136] reiterated the 1976 holding in *Brown v. State*,[137] which established the procedure for the admission into evidence of these statements.[138] The statement should be admitted only after the prosecution has rested its case in chief and the co-defendant has taken the stand and been cross-examined by defense counsel.[139] Furthermore, the trial judge should direct the jury that the statement must not be considered against the defendant.[140]

In *Langston*, the defendant was given the right to confront the co-defendant witness since the witness testified in his own behalf.[141] Therefore, the defendant's sixth amendment confrontation right was not violated and the trial court's failure to instruct the jury according to the procedural rule of *Brown* was not prejudicial error.[142]

C. *Sufficiency of Evidence*

1. Result of Insufficient Evidence

Jones v. State[143] involved the conviction of a defendant based upon the uncorroborated testimony of his accomplice.[144] The defendant's motion for a new trial based on insufficiency of the evidence was denied.[145] The supreme court reversed the conviction and discharged the defendant on the basis of insufficient evidence.[146]

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[136] 373 So. 2d 611 (Miss. 1979).

[137] 340 So. 2d 718, 721 (Miss. 1976).

[138] 373 So. 2d at 613.

[139] *Id.* (citing Brown v. State, 340 So. 2d 718, 721 (Miss. 1976)).

[140] 373 So. 2d at 613.

[141] *Id.*

[142] *Id. See* notes 182 through 189 and accompanying text *infra.*

[143] 368 So. 2d 1265 (Miss. 1979).

[144] *Id.* at 1265-66. For treatment of the corroboration issue, see notes 116 through 119 and accompanying text *supra.*

[145] 368 So. 2d at 1267.

[146] *Id.* at 1269. *Cf.* Woodfork v. State, 377 So. 2d 912, 916 (Miss. 1979) (defendant discharged after state failed to prove its case against defendant; jury verdict was against overwhelming weight of the evidence). *But cf.* Tapp v. State, 373 So. 2d 1029, 1031 (Miss. 1979) (reversal of prior conviction due to error in admitting testimony of defendant's spouse was based on trial error and not insufficiency of evidence so that remand

The court reasoned that if a defendant's motion for a new trial based on insufficiency of the evidence was denied, yet the appellate court finds the evidence insufficient, double jeopardy considerations preclude a second trial.[147] The court's decision comports with the mandate of the 1978 United States Supreme Court case, *Burks v. United States*,[148] requiring discharge in avoidance of double jeopardy.[149] The only just remedy is the direction of a judgment of acquittal.[150]

2. Evidence in Support of the Finding

Another case decided during the 1979 term, *Bennett v. State*,[151] concerned the sufficiency of circumstantial evidence. Appellant was convicted of murder and sentenced to life imprisonment.[152] He assigned as error that the evidence did not support the jury's verdict.[153] The evidence in the record consisted mainly of the testimony of several witnesses and the introduction of a gun belonging to the defendant.[154] One witness who knew Bennett testified that he saw the defendant walk toward an apartment complex with a shotgun in his hand, heard a shot,

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for second trial did not place defendant in double jeopardy).

[147] 368 So. 2d at 1268. *But cf.* Medious v. State, 375 So. 2d 405, 406 (Miss. 1979) (where the defendant has not filed a motion for a new trial on the grounds that the verdict is against the overwhelming weight of the evidence, the question cannot be raised for the first time on appeal); Thomas v. State, 377 So. 2d 593, 594 (Miss. 1979) (where defendant developed testimony in defense after overruling of motion for directed verdict, she waived any error extant).

In *Medious*, however, the court treated the defendant's assignment of error as invoking the issue whether or not the trial court erred in not granting a peremptory instruction of not guilty. 375 So. 2d at 406. *See generally* Parker, *Jury Reversal and the Appellate Court View of Law and Fact*, 14 OSGOODE HALL L.J. 287, 302-05 (1976) (discussing the difficulties faced by appellate courts in distinguishing legal issues from factual issues).

[148] 437 U.S. 1 (1978).

[149] *Id.* at 18.

[150] 368 So. 2d at 1268. *See* Bishop v. State, 370 So. 2d 238, 239 (Miss. 1979), where the opinion was based in part on Burks v. United States, 437 U.S. 1 (1978) and in part on Pegram v. State, 228 Miss. 860, 89 So. 2d 846 (1956).

[151] 374 So. 2d 803 (Miss. 1979).

[152] *Id.* at 804.

[153] *Id.*

[154] *Id.* at 804-05.

and later saw the defendant leave, still carrying a gun.[155] Another witness testified as to a jail cell conversation between the defendant and his mother concerning a gun.[156] The state did not introduce fingerprints but did introduce a gun, determined to be the defendant's.[157] A firearms expert could not positively link the shotgun pellets and wadding found in the victim to Bennett's shotgun, but his opinion was that the pellets and wadding were compatible with defendant's gun.[158]

On appeal the supreme court held that the evidence presented, though circumstantial, was strong enough to sustain the jury's verdict.[159] In discussing the sufficiency of the evidence, the court stated that no precise rule can be formulated; rather, the facts and cricumstances of each case must be considered.[160] "[A] conviction on circumstantial evidence is sufficient to support a verdict [if the evidence proves] guilt beyond a reasonable doubt to the exclusion of every other reasonable hypothesis."[161] At the same time, an unreasonable hypothesis of innocence does not warrant a reversal.[162] In light of these observations the court determined that enough circumstantial evidence was presented for the jury to convict the defendant.[163]

Also in connection with evidence sufficient to support the jury's finding, the court had occasion to hear the second appeal in a capital murder case, *Gray v. State*.[164] A two-stage trial was conducted[165] which resulted in the defendant's conviction and the imposition of a death sentence.[166]

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[155] *Id.* at 804.

[156] *Id.* at 805.

[157] *Id.* at 804-05. The police were led to the gun by an informant's tip.

[158] *Id.* at 804. *Cf.* Crump v. State, 375 So. 2d 225, 227 (Miss. 1979) (not reversible error to refuse to allow testimony of witness who conceded he was not an expert).

[159] 374 So. 2d at 805. The evidence established that an argument had arisen between the defendant and the victim two hours before the shooting. The court found that evidence sufficient, in connection with all the other circumstances, to establish motive. *Id.* *See* Stinson v. State, 375 So. 2d 235, 236-37 (Miss. 1979) (intent may be proved by circumstantial evidence).

[160] 374 So. 2d at 805.

[161] *Id.* (citing Fortenberry v. State, 216 Miss. 243, 62 So. 2d 325 (1953)).

[162] 374 So. 2d at 805 (citing Baker v. State, 317 So. 2d 901 (Miss. 1975)).

[163] 374 So. 2d at 805-06; *see* Bonnett v. State, 317 So. 2d 907, 909-10 (Miss. 1975) (sufficiency of circumstantial evidence is properly an issue for the jury's determination).

[164] 375 So. 2d 994 (Miss. 1979). Gray's first conviction was reversed and remanded. Gray v. State, 351 So. 2d 1342, 1349 (Miss. 1977).

[165] 375 So. 2d at 995. A two-stage trial is required in capital murder cases: the first

At trial, Gray's signed statement, detailing his sexual molestation of the three-year-old victim whose body had been thrown into a creek, was admitted into evidence, as was the testimony of a pathologist.[167] An FBI agent, qualified as an expert witness, testified about anal swabbings taken from the victim.[168] The court held that the evidence and reasonable inferences that could be drawn from it were sufficient to support the jury's finding of guilt.[169]

In dealing with the appellant's assignment of error concerning the admission of his signed statement, the court found that it was freely and voluntarily given.[170] In order to put the trial judge in error, the defendant had to raise an objection at trial that the statement was not made voluntarily.[171] The evidence clearly showed that the defendant had been given *Miranda* warnings, understood his rights, and knowingly and intelligently waived them.[172]

At the punishment phase of the trial, testimony and evidence were presented concerning Gray's prior second degree

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stage involves the question of the defendant's guilt while the second stage concerns the jury's determination of the sentence. Jackson v. State, 337 So. 2d 1242, 1253 (Miss. 1976). *See also* Gregg v. Georgia, 428 U.S. 153, 191-93 (1976) (a bifurcated system is more likely to eliminate the problem that occurs when questions prejudicial to the issue of guilt are nevertheless relevant to the issue of penalty).

[166] 375 So. 2d at 995-96. The jury found that Gray had abducted the victim and had killed her either to keep her from telling anyone about his sexual molestation of her or to silence her outcries. *Id.* at 998-99.

[167] *Id.* at 997-98. The pathologist's testimony revealed that the victim had died as a result of inhaling muddy material. *Id.* at 998.

[168] The swabbings indicated the presence of two chemicals found in semen, but the expert could not identify the presence of spermatozoa in the anus of the victim. *Id.* at 998. Other evidence also tended to establish sexual molestation. *Id.*

[169] *Id.* at 999. As to Gray's assignment of error concerning voir dire, see notes 182 through 185 and accompanying text *infra*.

[170] 375 So. 2d at 1001. *See* Yazzie v. State, 366 So. 2d 240, 243-44 (Miss. 1979) (confession made without *Miranda* warnings when the defendant was not under arrest or restrained and an officer was making a routine investigation is admissible).

[171] 375 So. 2d at 1001 (citing McGarrah v. State, 249 Miss. 247, 148 So. 2d 494, *cert. denied,* 375 U.S. 816 (1963)).

[172] 375 So. 2d at 1001. *Cf.* Thompson v. State, 375 So. 2d 233, 234-35 (Miss. 1979) (confession voluntarily made). As to the voluntary responses of the victim's mother while on the witness stand, see note 133 *supra*.

murder conviction.[173] The psychologist who had examined the defendant testified that Gray had denied having sexually molested the victim.[174]

The supreme court held that the jury had sufficient evidence before it in both the guilt and punishment phases of the trial to justify its finding beyond a reasonable doubt that the defendant had killed the victim intentionally and maliciously, either to silence her outcries or to prevent her reporting of the incident.[175]

The court's opinion in the instant case reveals that great care was used at the trial level in the prosecution, defense, and judicial handling of the case. The opinion is a careful, well-reasoned, point by point consideration of the case, reflecting the court's desire, especially in a capital murder case, to ensure that both phases of the trial support the jury's finding beyond a reasonable doubt.

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[173] 375 So. 2d at 1003.

[174] *Id.* The witness stated that Gray showed no indication of suffering from a pathological mental disease, was of normal intelligence, and knew right from wrong. The witness also testified that in his opinion a psychological report made while the defendant was in prison on the prior murder conviction and submitted by the defense in the instant case was of limited validity because the examination had been made nine years before. *Id. Cf.* Moore v. State, 374 So. 2d 821, 823 (Miss. 1979) (where the defendant's testimony is in direct conflict with evidence presented by the state, the jury is the sole judge of the weight and credibility of all witnesses; by returning a verdict of guilty, the jury rejected defendant's evidence); King v. State, 374 So. 2d 808, 812 (Miss. 1979) (jury's prerogative to take conflicting evidence as to defendant's sanity and reach a conclusion based on the evidence); Hogan v. State, 366 So. 2d 1089, 1090 (Miss. 1979) (testimony of witnesses as to defendant's ability to understand right from wrong both before and after killing was sufficient for jury finding of premeditation despite defendant's plea of insanity).

[175] 375 So. 2d at 1004 (citing Bell v. State, 360 So. 2d 1206 (Miss. 1978), *cert. denied,* 440 U.S. 950 (1979)). *Bell v. State* established the role of courts in death penalty cases, and discussed the jury's role in balancing mitigating and aggravating circumstances. The court in the instant case also relied on MISS. CODE ANN. § 99-19-105(2)(3) (Supp. 1978) concerning the role of the court and the factors to be considered by the court on appeal. *Cf.* Crump v. State, 375 So. 2d 225, 227 (Miss. 1979) (evidence appeared sufficient to have justified conviction of murder and undoubtedly was sufficient to support the defendant's conviction of manslaughter).

D. Admissibility of Evidence

1. Hearsay

In *McGowan v. State,*[176] involving the work of an undercover agent for the Mississippi Bureau of Narcotics, the defendant was convicted of the sale of more than one kilogram of marijuana. At the trial, the agent testified about meeting with McGowan's co-indictees, Crawford and Crenshaw, for the purpose of purchasing marijuana.[177] When the agent asked about the availability of additional marijuana for sale, Crenshaw and Crawford told him that a man would meet him at a tavern at a certain time.[178] The agent further testified that he arrived at the tavern and was told by Crenshaw and Crawford that the man would not meet with him because he did not know him.[179] Presently the defendant and another person drove up, the defendant entered the tavern, and the agent got into the car where the sale of marijuana to the agent occurred.[180] Though the defendant was not in the car when the transaction took place, the agent later saw him accept the money.[181]

On appeal, McGowan assigned as error the admission of the agent's testimony concerning his conversation with Crenshaw on the basis that it was outside the presence of the defendant, was hearsay, and therefore inadmissible.[182] Concluding that the evidence was admissible, the court stated that since the testimony was offered solely to show the information upon which the agent acted, it was immaterial how he acquired the information.[183]

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[176] 375 So. 2d 987, 988 (Miss. 1979).

[177] *Id.* at 988-89.

[178] *Id.* at 988.

[179] *Id.*

[180] *Id.*

[181] *Id.* at 989.

[182] *Id. Cf.* Kirkland v. State, 371 So. 2d 402, 404 (Miss. 1979) (hearsay testimony concerning a statement made by rape victim when accused was not present is inadmissible). *But cf.* Rasco v. State, 378 So. 2d 211, 213 (Miss. 1979) (harmless error to admit hearsay where peremptory instruction negated effect of hearsay); Jones v. State, 367 So. 2d 458, 459-60 (Miss. 1979) (testimony of bystander as to his statement made in presence of accused who had opportunity to ignore, deny, or respond is exception to hearsay rule).

[183] 375 So. 2d at 989-90. *See* Lee v. State, 338 So. 2d 395, 397 (Miss. 1976) (citing C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 246, at 584 (2d ed. 1972)), where the court stated: "To constitute hearsay, extra-judicial words must by some means present a

Since the out-of-court declaration made by Crenshaw was not introduced to prove the truth of Crenshaw's assertion that the seller would meet with the agent but only to show why the latter was at the tavern on that particular day, it was competent to show the information upon which the agent acted.[184]

The court further stated that a witness may not repeat an out-of-court statement which names the defendant as the person from whom the contraband may be purchased. However, in the instant case, since the out-of-court statement testified to did not identify the defendant as the man who had offered the marijuana for sale, the above rule was inapplicable.[185]

There was a miscellany of other hearsay issues during the 1979 term including a reaffirmation, in *Fermo v. State*,[186] of the rule in Mississippi that the exception to the hearsay rule for declarations against penal interest does not apply where the declarant is unavailable to testify.[187] The court relied on *Chambers v. Mississippi*,[188] in which the United States Supreme Court

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statement, declaration, or assertion introduced for the purpose of proving the truth of the matter contained in or asserted by the item or thing."

[184] 375 So. 2d at 990. Proof at trial showed defendant's participation as an accessory before the fact; such accessories are deemed to be principals, indictable and punishable as such, under Miss. Code Ann. § 97-1-3 (1972). 375 So. 2d at 990.

[185] 375 So. 2d at 990 (citing McVeay v. State, 355 So. 2d 1389, 1391 (Miss. 1978)). In *McVeay* the court held that testimony by an undercover agent was inadmissible because it directly implicated the defendant in the sale of marijuana.

[186] 370 So. 2d 930 (Miss. 1979).

[187] *Id.* at 934. The supreme court cited Thompson v. State, 309 So. 2d 533, 535 (Miss.), *cert. denied*, 423 U.S. 924 (1975), which held that Brown v. State, 99 Miss. 719, 55 So. 961 (1911), remains the controlling case on this hearsay exception in Mississippi. 370 So. 2d at 934. *See generally* Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U. L. Rev. 148, 150-51, 153-79 (1976) (factors for determining trustworthiness and reliability necessary for admission); Note, *Evidence—The Unavailability Requirement for Declaration Against Interest: Should It be Retained?* 39 Mo. L. Rev. 461, 462-66 (1974) (admitting declaration against interest without regard to unavailability is undesirable).

[188] 410 U.S. 284 (1973). *But cf.* Johnson v. State, 368 So. 2d 824, 826 (Miss. 1979) (transcript of witness' testimony at preliminary hearing held admissible at trial only if witness is unavailable and court receives timely notice). *See generally* Mason & Hengen, *The Hearsay Rule in Mississippi: "Out of the Presence of the Adverse Party—In the Presence of the Adverse Party,"* 47 Miss. L.J. 423, 425-28 (1976) (evolution of the rule); Comment, *The Unavailability Requirement for Exceptions to the Hearsay Rule*, 41 Mo. L. Rev. 404, 405-23 (1976) (conditions that constitute unavailability for purposes of admitting prior out-of-court statements under exception to hearsay rule); Note, *Evidence—Hearsay Exception—Requirements for Unavailability of Witness in Criminal*

stated that in situations other than where the declarant is present at trial, a valid state purpose might be served in excluding untrustworthy testimony.[189]

The cases also included a reiteration of the principle that the introduction of evidence which is kept and used in the normal course of a business, including computer printouts, in the custody and control of a witness who is an official in the business and who is qualified to testify concerning such evidence is not objectionable as hearsay.[190]

2. Other Categories of Admissible Evidence

In *Phillips v. State*,[191] the defendant was convicted of the attempted bribery of an elected district attorney.[192] Tape recordings of the various meetings and phone conversations between Phillips, the defendant, and the public official were introduced into evidence.[193] The officers who made the recordings also testified as to what they heard when the radio transmitter they were monitoring received the conversations.[194] The recordings were properly authenticated at trial.[195]

Defendant's assignment of error concerned the lower court's permitting of the officers who had taped the conversations to testify as to what they had heard.[196]

The court concluded that both the tapes and the testimony of witnesses who had overheard the conversations were admissible.[197] The court also pointed out that because the lower court allowed the witnesses to testify, the defense had an opportunity to cross-examine the witnesses to show any inaccuracies between

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Case Under the Federal Law of Evidence, 29 RUTGERS L. REV. 133, 134-42 (1975) (hearsay exception for testimony of witness at a prior hearing if witness cannot be produced to testify at trial; right of confrontation; diligence of search).

[189] 370 So. 2d at 934.

[190] Minor v. State, 379 So. 2d 495, 497 (Miss. 1979). The court also discussed the Mississippi rule on the introduction of computer printouts. *Id.*

[191] 374 So. 2d 824 (Miss. 1979).

[192] *Id.* at 824.

[193] *Id.* at 824-25.

[194] *Id.* at 825-26.

[195] *Id.* at 826.

[196] *Id.* at 825.

[197] *Id.* at 826.

what they said and what was on the tapes.[198]

In *Hughes v. State,*[199] on the issue of the admissibility of an out-of-court statement by the defendant, the court held that the testimony indicated that the defendant signed a form waiving his rights, made a voluntary statement and fully understood his rights.[200] From the facts given in the opinion, it appears that the sheriff's investigator was careful to ensure that the defendant understood his rights prior to signing the waiver form and making a statement.[201]

E. Suppression and Destruction of Evidence

Only one major case this term, *Moore v. State,*[202] dealt, in any appreciable degree, with suppression and destruction of evidence.

Christopher Moore was tried a second time for the murder of a Pascagoula school teacher and was sentenced to life imprisonment by the judge after the jury failed to agree on the punishment.[203] The court affirmed the conviction.[204]

Relying on *Brady v. Maryland,*[205] appellant contended that the lower court erred in denying his motion to dismiss the indictment since the police had discarded, destroyed, or failed to preserve evidence that might have been exculpatory.[206] Dismissing this contention, the court held that to justify reversal on the *Brady* theory, it must be demonstrated that the evidence not produced was favorable to the defendant.[207] This was not shown in the instant case.[208]

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[198] *Id. Cf.* Gregg v. State, 374 So. 2d 1301, 1305 (Miss. 1979) (where diagrams and photographs of an accident contained discrepancies and omissions, but the officers who testified explained the discrepancies and omissions, the evidence was not prejudicial to the defendant).

[199] 376 So. 2d 1349 (Miss. 1979). The defendant was convicted in a non-capital murder case based in part upon his out-of-court confession. *Id.* at 1350-51.

[200] *Id.* at 1351-52. "The fact that the appellant had little formal education and was not represented by counsel does not preclude an effective waiver of his right to remain silent or to have counsel present during custodial interrogation." *Id.* at 1352 (citing Lee v. State, 338 So. 2d 399 (Miss. 1976), *noted in* 49 MISS. L.J. 143 (1978)).

[201] 376 So. 2d at 1350-51. The defendant was advised of his rights upon arrest before leaving his home, in the police car, and again at the sheriff's office. *Id.* at 1351.

[202] 374 So. 2d 821 (Miss. 1979).

[203] At the first trial, Moore was indicted for capital murder, convicted in a two-stage trial and sentenced to death. Moore v. State, 344 So. 2d 731, 732 (Miss. 1977).

[204] 374 So. 2d at 824.

[205] 373 U.S. 83 (1963). *Brady* held that under some circumstances suppressing evidence that is favorable to the accused may violate due process. *Id.* at 87-88.

[206] 374 So. 2d at 822-23. In Johnston v. State, 376 So. 2d 1343 (Miss. 1979), the defendant's request for exculpatory evidence came one month after an alleged rape and

In treating appellant's assertion that the lower court erred by not suppressing certain physical evidence because the taking of it violated his constitutional rights, the court stated that this issue had been completely considered in Moore's prior appeal. The court also pointed out that the defendant was voluntarily at the police station, was not under arrest, and was free to leave at the time the evidence was procured.[209]

This case involved a heinous crime. The victim was sexually abused before her attacker fatally stabbed her.[210] The court's consideration of the record on appeal is a recognition that the careful prosecution of a case results in a conviction that will be upheld.[211]

IV. CRIMINAL PROCEDURE

A. Remedy for Trial Held in Violation of Double Jeopardy Clause

The Constitution of the United States provides that no per-

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his motion for semen samples and vaginal fluid came more than three months after the alleged crime. *Id.* at 1345-46. The samples were no longer viable because the defendant had waited too long to request them. The defendant's own witness testified that the samples were not viable after one month. *Id.* at 1346.

The supreme court held that " 'the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" so as to require production on a general request.' " 376 So. 2d at 1346 (quoting United States v. Agurs, 427 U.S. 97, 109-10 (1976) and Scott v. State, 359 So. 2d 1355, 1362 (Miss. 1978)). As to the preservation of the samples, the court held that the state had acted in good faith and had followed normal operating procedures. 376 So. 2d at 1346.

[207] 374 So. 2d at 823.

[208] *Id.* The police officers testified that identification of the fingerprints that Moore questioned was impossible because of their smudged condition and that the prints had been discarded for that reason. *Id.*

[209] *Id.*

[210] *Id.* at 822.

[211] *See* notes 151 through 163 and accompanying text *supra* on the use of circumstantial evidence in a murder trial.

son shall twice be placed in jeopardy for the same offense.[212] The common law rule in both England and the United States was that no man could be twice brought into jeopardy for the same offense, whether he had been acquitted or convicted at trial, or whether he had been punished for the crime charged.[213] The United States Supreme Court has been unwilling, however, to establish rigid rules governing the application of the double jeopardy clause, relying instead on the particular facts and circumstances of each case presented to it.[214]

The Court has held that an acquittal of an offense acts as a bar to any further prosecution on the same offense.[215] Early opinions of the Court also indicated that a conviction of a lesser offense did not bar a prosecution for the greater offense on a new trial.[216] The rationale for this holding was that defendant's position in a new trial was the same as if the first trial had not been held.[217]

The earliest Mississippi decisions were not in accord with this rule, holding instead that an accused who had been convicted of a lesser offense could not be tried a second time for the greater offense.[218] These cases, for the most part, were decided before the Mississippi Constitution of 1890 was adopted with an amended double jeopardy clause providing that there must be an actual acquittal to bar a subsequent prosecution.[219] Initially, it appeared that the change in the constitutional provision would have no effect on the Mississippi Supreme Court's holdings in cases addressing the issue of conviction of a lesser offense as a bar to subsequent prosecution for the greater offense.[220] These holdings, however, did not go unquestioned or uncriticized.[221]

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[212] U.S. CONST. amend. V.

[213] For a brief historical analysis of the policies underlying the double jeopardy concept, see 32 VAND. L. REV. 609, 613-14 (1979) (citing 4 W. BLACKSTONE, COMMENTARIES* 335-38 and 3 J. STOREY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1781 (Cambridge 1833)).

[214] Wade v. Hunter, 336 U.S. 684, 688 (1949) (defendant is not subjected to double jeopardy merely because case retried after competent jury fails to enter a judgment). *See* Bretz v. Crist, 546 F.2d 1336, 1348 (9th Cir. 1976) (in dealing with questions of double jeopardy, Supreme Court is reluctant to develop strict rules); Whitfield v. Warden, 486 F.2d 1118, 1121-22 (4th Cir. 1973) (particular facts and not rigid rules govern application of double jeopardy standards), *cert. denied*, 419 U.S. 876 (1974).

[215] In United States v. Ball, 163 U.S. 662 (1896), the Court noted that "[h]owever it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense." *Id.* at 671 (citations omitted).

[216] In Brantley v. Georgia, 217 U.S. 284 (1910), the petitioner had been tried for murder and found guilty of a lesser form of homicide. After appeal and reversal of the judgment a new trial was ordered at which he was convicted of murder. The Court denied his contention that this constituted double jeopardy in violation of the Georgia and United States Constitutions, stating that this was not a case of double jeopardy under any interpretation of the Constitution. *Id.* at 284-85.

[217] This rationale was applicable whether the new trial was held on defendant's motion or on appeal. The defendant, therefore, could not plead double jeopardy and would not be allowed to benefit from the earlier verdict if he chose to appeal it. Annot., 59 A.L.R. 1160, 1160-61 (1929).

In 1926, the double jeopardy clause was considered in *Jones v. State.*[222] Appellant had been indicted for murder and found guilty of manslaughter. After the jury verdict was set aside, Jones was retried for murder under the same indictment, convicted, and sentenced to life imprisonment.[223] Noting the change in the language of the double jeopardy provision in the 1890 constitution and giving its plain meaning to the word "actual" as applied to convictions or acquittals, the court upheld defendant's conviction.[224] The *Jones* holding was followed in later decisions.[225]

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[218] Rolls v. State, 52 Miss. 391, 397 (1876) (announcing the rule in dictum, without citation of authorities or explanation); Morris v. State, 16 Miss. (8 S. & M.) 762, 772 (1847) (holding guilty verdict tantamount to an acquittal on other counts of the indictment, but not addressing the former double jeopardy clause of the state constitution).

[219] The new section read: "No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution." MISS. CONST. art. 3, § 22 (1890). The earlier provision had simply read: "No person shall, for the same offense, be twice put in jeopardy of life or limb. . . ." *Id.* art. 1, § 13 (1832).

[220] *See* Walker v. State, 123 Miss. 517, 519, 86 So. 337, 338 (1920) (holding that subsequent prosecution was barred, but making no mention of the material change in the former jeopardy clause of the 1890 constitution); Powers v. State, 83 Miss. 691, 698-99, 36 So. 6, 6-7 (1904) (relying on *Rolls*, but making no mention of the change in the constitutional provision since that decision, and noting that the court could see no reason why the established rule should be abandoned).

[221] Vigorously dissenting in Calicoat v. State, 131 Miss. 169, 95 So. 318 (1923), Justice Ethridge cited numerous authorities holding that acquittal on the lesser offense was not a bar to subsequent prosecution for the greater offense. *Id.* at 196-99, 95 So. at 324-25. Justice Ethridge's dissent in *Calicoat* heralded what was shortly to become and to remain for many years the rule in Mississippi. For an earlier opinion espousing the same principle in dictum, see Parker v. State, 102 Miss. 113, 116, 58 So. 978, 979 (1912) (acknowledging the Mississippi rule, but recognizing that it may be seriously questioned and that numerous jurisdictions have adopted the opposite view).

[222] 144 Miss. 52, 60, 109 So. 265, 265 (1926).

[223] *Id.*, 109 So. at 265.

The constitutionality of the "new" Mississippi rule came into serious question with the United States Supreme Court's 1957 decision in *Green v. United States*.[226] Holding that a successful appeal of an improper conviction on a lesser offense did not constitute a waiver of the double jeopardy defense to a second prosecution on a first degree murder charge,[227] the Court stated that such a case should be treated no differently than one in which the jury had returned a verdict of not guility on the first degree murder count.[228] Whether or not the *Green* holding applied to state court prosecutions, however, remained unclear.[229]

This question was answered in 1969 with the Supreme

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[224] *Id.* at 62, 109 So. at 266. The court reasoned that:

> [i]f a verdict of manslaughter impliedly acquits the defendant of murder, it also impliedly adjudges that he is not innocent. One implication flows as necessarily and readily from a conviction of manslaughter as the other. To hold that an appellant can appeal and set aside a judgment of conviction of manslaughter and annul the verdict upon which it is entered, and upon which no other judgment could be entered, is to leave the shadow without the substance; to leave the implied and remove the actual thing upon which the implication is based. If the verdict convicting of manslaughter is destroyed, it is difficult for the reasoning mind to see how any implied verdict or judgment can exist.

Id. at 72, 109 So. at 269. *See also* Annot., 61 A.L.R.2d 1141, 1205 (1958) (examining the change in the Mississippi rule and the court's decision in *Jones*).

[225] *See* Butler v. State, 177 Miss. 91, 100, 170 So. 148, 149 (1936) (appellant, indicted for murder and convicted of manslaughter, could be tried again under murder indictment when guilty verdict was overturned); Bell v. State, 149 Miss. 745, 749, 115 So. 896, 897 (1928) (appellant might again be tried for murder when trial under murder indictment terminated in conviction for assault with intent to kill which was later overturned).

[226] 355 U.S. 184 (1957).

[227] *Id.* at 191-92.

[228] *Id.* at 191. Green had been indicted for arson and murder, and the trial judge had instructed the jury that they could convict the defendant of either first degree or second degree murder. The jury had found him guilty of arson and second degree murder, but not of first degree murder. Green had appealed the second degree murder conviction and the appellate court had reversed that conviction and remanded for a new trial. On remand, Green had been convicted of first degree murder and had received a mandatory death sentence. *Id.* at 185-86.

[229] The *Green* case had reached the Supreme Court on writ of certiorari from the Court of Appeals for the District of Columbia. *Id.* at 186.

Court's decision in *Benton v. Maryland.*[230] *Benton* held that the fifth amendment's double jeopardy provision represents a fundamental ideal in our constitutional heritage which should apply to the states through the fourteenth amendment, and that the validity of state court convictions should be tested by the Court's interpretation of that provision, rather than the former standard of whether, under the totality of the circumstances, there had been a denial of "fundamental fairness."[231] It readily became apparent that the *Benton* ruling would be strictly enforced.[232]

After *Benton,* the first consideration of the issue whether retrial on a greater offense following reversal of defendant's conviction on a lesser included offense justifies invocation of the doctrine of double jeopardy came in the Supreme Court's 1970 decision in *Price v. Georgia.*[233] The Court, holding that when the first verdict is limited to the lesser included offense retrial must also be limited to that offense,[234] flatly rejected the state's argument that the second jeopardy was harmless error since the defendant was convicted of the same crime, not the greater one, at the second trial and suffered no greater punishment because of his second conviction.[235] The Court noted that the social stigma attached to a prosecution for murder compared with that of a prosecution for manslaughter constituted a valid reason for concern.[236]

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[230] 395 U.S. 784 (1969).

[231] *Id.* at 794. *Benton* overruled Palko v. Connecticut, 302 U.S. 319, 322-23 (1937), which held that the fourteenth amendment did not make the double jeopardy clause of the fifth amendment applicable to the states. 395 U.S. at 794.

[232] *See, e.g.,* Waller v. Florida, 397 U.S. 387, 388, 395 (1970) (where petitioner was charged with violation of city ordinance, was found guilty, and was subsequently indicted by state for grand larceny arising from the same act, the Court held that trial in municipal court was a bar to state action).

[233] 398 U.S. 323 (1970).

[234] *Id.* at 327-29. The Court noted that "[s]uch a result flows inescapably from the Constitution's emphasis on a risk of conviction and the Constitution's explication in prior decisions of this Court." *Id.* at 327.

[235] *Id.* at 331. In rejecting the prosecution's argument, the Court stated:

> [t]he Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.

Id. In support of its position, the state relied on Chapman v. California, 386 U.S. 18, 24 (1967) (for federal constitutional error to be harmless, the court must be able to declare it harmless beyond a reasonable doubt) and Harrington v. California, 395 U.S. 250, 254

Since *Price,* Mississippi, in abrogation of its former rule, has recognized that reversal of a conviction on a lesser included offense and subsequent prosecution for the greater offense is violative of the double jeopardy clause.[237] The Mississippi Supreme Court in 1979 addressed the remedy for a subsequent prosecution and conviction on the greater offense after reversal of a conviction on the lesser offense in *Tapp v. State.*[238] Tapp had been convicted of manslaughter, but the conviction had been reversed on appeal.[239] Appellant was tried again under the murder indictment and convicted of murder.[240]

Relying on two recent United States Supreme Court decisions, the court found no merit in defendant's claim that a retrial on any charge placed him in double jeopardy in violation of the fifth and fourteenth amendments.[241] Although holding that

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(1969) (conviction upheld because of overwhelming weight of evidence, although error found in proceeding).

[236] 398 U.S. at 331 n.10.

[237] *See* Varnado v. State, 338 So. 2d 1239, 1241 (Miss. 1976) (recognizing the protection against a future prosecution for capital murder by the constitutional provision against double jeopardy); Wood v. State, 257 So. 2d 193, 194, 200-01 (Miss. 1972) (where defendant was indicted for murder and convicted of manslaughter, case was remanded to trial court for retrial on charge of manslaughter). In fact, as recently as April, 1979, the court implicitly recognized this principle in Thornton v. State, 369 So. 2d 505 (Miss. 1979), when it reversed and remanded for trial on a charge of manslaughter where defendant had been convicted of manslaughter under a murder indictment in the trial court. *Id.* at 507.

[238] 373 So. 2d 1029 (Miss. 1979).

[239] Tapp v. State, 347 So. 2d 974, 977 (Miss. 1977). The court held that it was reversible error for the state to compel the defendant's wife to testify against him in violation of a state statute. *Id. See* MISS. CODE ANN. § 13-1-5 (1972).

[240] 373 So. 2d at 1030.

[241] *Id.* at 1031. The court relied on Greene v. Massey, 437 U.S. 19 (1978) and Burks v. United States, 437 U.S. 1 (1978). *Burks* had explicitly held that reversal for trial error, rather than for insufficient evidence, did not preclude a retrial. 437 U.S. at 14-16. Some question is raised, however, as to whether *Burks* and *Greene* are good authority for the court's holding under the specific circumstances of *Tapp,* because of a footnote in *Greene* stating that the United States Supreme Court expressed no opinion as to double jeopardy implications of a retrial following a holding that the legally competent evidence brought out at trial was insufficient to prove guilt. *Id.* at 26 n.9. The original conviction in *Tapp* was reversed since "without the wife's testimony, the record on the first trial of this case would not sustain a conviction. However, since that testimony [was] incompe-

Tapp's retrial for murder rather than manslaughter was error,[242] the court upheld appellant's conviction and remanded the case for a sentencing hearing, limited to a sentence consistent with a charge and conviction of manslaughter.[243]

In view of Tapp's conviction of murder on retrial after reversal of his manslaughter conviction, the holding in *Tapp*[244] appears inconsistent with the *Price* standard,[245] even though the *Tapp* court emphasized that the evidence abundantly supported the murder conviction.[246] Also considered in *Price*, but not in *Tapp*, was the significantly greater social stigma attached to a murder prosecution compared with one for manslaughter.[247] The dissent in *Tapp* argued that the trial was unconstitutional, and that the case should have been remanded for a new trial on a manslaughter charge.[248] Though this would have resulted in a greater expenditure of judicial time and energy, such sacrifice would have been a small price to pay for the preservation of the defendant's constitutional rights.

B. Jury Instructions—Presumption from Prosecution's Failure to Call Witness

The common law rule has long been that the nonproduction of evidence which, in the natural course of things, would have

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tent, the case [was] reversed and remanded for a new trial upon such other evidence as the State [might] be able to present." 347 So. 2d at 977.

[242] 373 So. 2d at 1031. *See* text accompanying note 236 *supra*.

[243] 373 So. 2d at 1032.

[244] *See* notes 241, 242 and accompanying text *supra*.

[245] *See* notes 234 through 236 and accompanying text *supra*.

In making its argument that the retrial on the greater offense was harmless, the state had an even stronger position in *Price*, in that the defendant had been convicted and sentenced for the lesser offense, for which he could have been validly retried. 398 U.S. at 331. That argument is inapplicable in the *Tapp* situation.

[246] 373 So. 2d at 1030-32.

[247] In *Price*, the Court reasoned:

> [t]here is a significant difference to an accused whether he is being tried for murder or manslaughter. He has reason for concern as to the consequences in terms of stigma as well as penalty. He must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well.

398 U.S. at 332 n.10. *See* text accompanying note 236 *supra*.

[248] 373 So. 2d at 1032-33 (Patterson, C.J., dissenting).

been favorable to the party producing such evidence permits the inference that its tenor is unfavorable to the party's cause.[249] The same general rule applies to the nonproduction of witnesses, based on the failure to produce a witness when it would be natural for the party to produce the witness if the facts known by the latter had been favorable.[250] Two recognized exceptions to the general rule are: (1) where the witness is equally available to both parties, and (2) corroborative, cumulative, or unimportant testimony.[251] As to the equal availability exception, however, some commentators argue that the more logical view is that it is open to an inference against either party.[252]

Several arguments have been made against the existence of a presumption or inference arising from nonproduction of a witness.[253] Among these are that any inference which arises will be mere speculation.[254] Another is that there is no duty to call every witness and that the parties select the witnesses they will call after considering such factors as trial strategy, time, and fear of prejudicing the case or introducing error.[255] Two other arguments against allowing the inference are "the fear that the party will be prejudiced because the jury might associate nonproduction with willful suppression"[256] of evidence, and the fact that the reluctance of persons to testify may be the real cause of nonproduction.[257]

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[249] 2 J. Wigmore, Evidence § 285, at 162-63 (3d ed. 1940) (quoting Armory v. Delamirie, 1 Strange 505 (1722) (action by chimneysweep against a jeweler who wrongfully took a jewel the chimneysweep had found; the jeweler's failure to produce the gem created a presumption that its value was that of the best jewel of its size)).

[250] 2 J. Wigmore, *supra* note 249, § 286, at 166-68; 22A C.J.S., *Criminal Law* § 594, at 270 (1961) (discussing and citing authorities in support of this general rule).

[251] *See* Jennings v. United States, 391 F.2d 512, 516 (5th Cir. 1968) (no inference may be drawn where witness is equally available to both parties); Shurman v. United States, 233 F.2d 272, 275 (5th Cir. 1956) (same); McClanahan v. United States, 230 F.2d 919, 925-26 (5th Cir.) (no inference arises where witness is equally available to both parties, particularly where witness is present in open court), *cert. denied,* 352 U.S. 824 (1956). *Contra,* Comment, *Permissive Inference From the Nonproduction of Equally Available Witnesses,* 73 Dick. L. Rev. 337, 338-39 (1968) (inference should be available against either party).

[252] *See* Comment, *supra* note 251, at 339. *See also* 2 J. Wigmore, *supra* note 249, § 288, at 169-71.

[253] *See generally* Comment, *supra* note 251, at 341-44.

[254] *Id.* at 342. *See* Billeci v. United States, 184 F.2d 394, 398-99 (D.C. Cir. 1950) (where the witness is equally available to both parties, allowing inference would be purely speculative as to what witness would have said); Bates v. Morris, 101 Ala. 282, 13 So. 138, 140 (1893) (where the witness is equally available to both parties, the jury does not have the right to guess as to what witness might have said had he been called to testify).

[255] Comment, *supra* note 251, at 342-43. *See* Morton v. United States, 147 F.2d 28, 31 (D.C. Cir. 1945) ("evidence and witnesses . . . [are] sifted and selected with a view to

Arguments in favor of allowing the inference are normally based on such factors as the wide latitude given counsel in arguing their cases before the jury[258] and the benefit to the jurors of allowing them to consider the factor of nonproduction and permitting them to draw an inference from it.[259]

The Court of Appeals for the Fifth Circuit has recognized the rule, in criminal as well as civil cases, that when it is peculiarly within the power of one party to produce a witness whose testimony would elucidate the transaction, failure to produce the witness creates the presumption that the testimony would have been unfavorable.[260] Additionally, the court has accepted the general rule that when a witness is equally available to both sides, neither may benefit from an inference arising from nonproduction of the witness.[261]

In Mississippi, the history of the inference or presumption arising from failure to produce a witness is not entirely clear. One of the first cases addressing this point was a suit on the

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economy of trial—time and the better understanding of the case by the jury").

[256] Comment, *supra* note 251, at 343.

[257] *Id.* at 343-44.

[258] *Id.* at 345.

[259] *Id.* at 346. *See generally* 2 J. WIGMORE, *supra* note 249, § 288, at 91-95 (3d ed. Supp. 1979). For a good statement of the general policy behind allowing the presumption or inference to arise from the prosecutor's failure to call a witness in a trial for a criminal offense, see 22A C.J.S., *supra* note 250, at 373-74 (1961). *See also* Morgan v. Gardner, 264 F. Supp. 576, 577 n.3 (S.D. Miss. 1967) (enunciating the general rules concerning presumptions and inferences from nonproduction).

[260] *See* Ford v. United States, 210 F.2d 313, 317 (5th Cir. 1954) (pronouncement of this general rule in prosecution for attempted income tax evasion) (citing Graves v. United States, 150 U.S. 118, 121 (1893) (citing early authorities for this proposition) and Billeci v. United States, 184 F.2d 394, 398 (D.C. Cir. 1950) (jury may draw inference if witness peculiarly available to one side is not called)).

[261] *See* Beale v. United States, 263 F.2d 215, 216 (5th Cir. 1959) (instruction that government investigator's companions were also available as witnesses for defendants held not prejudicial) (quoting United States v. Antonelli Fireworks Co., 155 F.2d 631, 639 (2d Cir.), *cert. denied,* 329 U.S. 742 (1946)).

provisions of a land deed, *Bunckley v. Jones.*[262] The appellant failed to call as a witness his father, who was more closely connected with the transaction than anyone else.[263] There the court held that it could be presumed that, had the father testified, his evidence would have been adverse to the appellant.[264] The court has articulated this rule in subsequent cases,[265] and has also stated the rule that the failure of either party to examine a witness equally accessible to both is not a proper subject of comment before the jury by either.[266]

In a 1911 decision, *Brown v. State,*[267] the Mississippi Supreme Court held that the district attorney's comments on the failure of the defendant to call as a witness his brother, who was present in the courtroom, constituted reversible error.[268] Relying on equal accessibility, it concluded that no basis for a prejudicial inference arose from the defendant's inaction.[269] Thirty-five years later, however, that portion of the decision was overruled in another case by the same name.[270] Basing its decision on the premise that although a witness may be brought into court by compulsory process of either party, he is not necessarily equally accessible to either, the court in the second *Brown* case held that defendant's failure to produce a witness was a proper subject for comment.[271] Equal accessibility means not only the physical presence of the witness, but that what he knows is equally available to the opposing party.[272]

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[262] 79 Miss. 1, 29 So. 1000 (1901).

[263] *Id.* at 7-8, 29 So. at 1002.

[264] *Id.* at 8, 29 So. at 1002 (citing Barnes v. Shreveport R.R., 47 La. Ann. 1218, 17 So. 782, 783 (1895)).

[265] *See* Masonite Corp. v. Hill, 170 Miss. 158, 154 So. 295 (1934), in which the court noted that:

> where a party, who has the burden of proof, has the power to produce evidence of a more explicit, direct, and satisfactory character than that which he does introduce and relies on, he must introduce that more explicit, direct and satisfactory proof, or else suffer the presumption that, if the more satisfactory evidence had been given, it would have been detrimental to him and would have laid open deficiencies in, and objections to, his case, which the more obscure and uncertain evidence did not disclose.

Id. at 167, 154 So. at 298.

[266] Heafner v. State, 196 Miss. 430, 437, 17 So. 2d 806, 808 (1944) (quoting Archer v. State, 140 Miss. 597, 609, 105 So. 747, 748 (1925)).

[267] 98 Miss. 786, 54 So. 305 (1911).

[268] *Id.* at 796, 54 So. at 306-07.

[269] *Id.*

[270] Brown v. State, 200 Miss. 881, 27 So. 2d 838 (1946).

The court has not adhered strictly to this standard, as evidenced by *Phillips v. State,*[273] a 1966 decision. Defense counsel complained in his argument of the state's failure to question a witness who was present in the courtroom.[274] The trial judge sustained an objection to the comment, stating that the witness was equally available to both parties because of his presence in the courtroom.[275] The Supreme Court, citing the second *Brown* decision, but without addressing the requirement that what the witness knows be equally available to both sides,[276] affirmed the trial court.[277]

In *Henderson v. State,*[278] the court again had the opportunity to consider the permissibility of the presumption from nonproduction of a witness in the context of a jury instruction in a criminal prosecution. The defendant's instruction, rejected by the court, stated that the prosecution's failure to call two confidential informants as witnesses created a presumption that this testimony would have been adverse to the state.[279] Stating that the presumption has been applied only in civil cases and that no criminal cases had been cited in which an instruction on the presumption was allowed, the court reasoned that the failure to grant the instruction was not reversible error.[280]

The decision, though not limited to cases where the nonproduced witnesses are confidential informers, is consistent with the policy of encouraging would-be informants to relay their information to the proper officials.[281] The decision presents two problems, however, which should be resolved at the first opportunity. The court has created a civil/criminal dichotomy, indicating that an instruction on the presumption may be proper in a civil case while it would not be proper in a criminal proceeding.[282] Until a decision is rendered on the issue of permissibility of the instruction in criminal cases, attorneys and trial judges will be in a quandary as to whether to ask for or grant such instructions. Additionally, as noted in the opinion, the court under certain circumstances has held an attorney's comments in closing argument concerning the presumption permissible in criminal cases.[283] Because of the confusion as to when such comments are permissible,[284] the court should prescribe definite standards on this issue when it is next presented.

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[271] *Id.* at 887, 27 So. 2d at 840. It did not appear from the record whether or not the witness was present in the courtroom. *Id.* at 884, 27 So. 2d at 838.

[272] *Id.* at 889, 27 So. 2d at 841.

[273] 183 So. 2d 908 (Miss. 1966).

[274] *Id.* at 910.

[275] *Id.*

[276] It appeared from the record that the witness had been seated in the deceased's automobile and had fired shots at the defendant. *Id.* at 909.

[277] *Id.* at 911. *See also* Fuller v. Sloan, 230 So. 2d 574, 576 (Miss. 1970) (civil case upholding the presumption that testimony would be adverse when witnesses having knowledge of peculiar facts fail to testify, without addressing question of equal accessibility).

[278] 367 So. 2d 1366 (Miss. 1979).

[279] *Id.* at 1367-68.

[280] *Id.*

C. Bail Requirements for Indigent Defendants

The Supreme Court has never expressly held that the denial of release of an indigent defendant on personal recognizance when he is unable to secure bail violates the protections of due process and equal protection. Nevertheless, several decisions have indicated that such denial may be impermissible.[285] In Mississippi, the right to bail before conviction is constitutionally mandated in most cases,[286] and its denial constitutes punishment before trial.[287] The purpose of the bail requirement is to ensure that the accused appears for trial,[288] but the fixing of bail is within the sound discretion of the trial judge.[289]

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[281] *See* Marrs, *The Informant and Accomplice Witness: Problems for the Prosecution,* 9 J. Mar. J. Prac. & Proc. 243, 246 (1975) (disclosure of identity of informant discourages communication between informants and police); 8 J. Wigmore, *supra* note 249, § 2374, at 761-62 (rev. ed. 1961) (same).

[282] *See* text accompanying note 280 *supra.*

[283] 367 So. 2d at 1368.

[284] *See* notes 267 through 277 and accompanying text *supra.*

[285] *See* Williams v. Illinois, 399 U.S. 235, 243 (1970) (convicted indigent's one year sentence may not be extended due to prisoner's inability to pay $500 fine); Griffin v. Illinois, 351 U.S. 12, 19-20 (1956) (indigent defendants, to be accorded adequate appellate review, must be provided with transcripts at state's expense). *See also* Pelletier v. United States, 343 F.2d 322, 323 (D.C. Cir. 1965) (courts must consider nonmonetary forms of release when indigent defendant is unable to afford sufficient bail for pretrial release); Bandy v. United States, 82 S. Ct. 11, 13 (Douglas, Circuit Justice, 1961) (holding that no person should be denied release because of his indigence, in application for release on personal recognizance pending disposition of certiorari petition); Bandy v. United States, 81 S. Ct. 197, 198 (Douglas, Circuit Justice, 1960) (since fixing of bail in even moderate amount may virtually preclude indigent's release, bond requirement may be dispensed with in certain cases).

In 1966, federal legislation was enacted giving priority to release on personal recognizance in non-capital bailable offenses, unless the trial judge determines that such release will not reasonably ensure the defendant's appearance.[290] Several states have adopted similar legislation.[291] The Court of Appeals for the Fifth Circuit, in *Pugh v. Rainwater*,[292] a class action suit in which plaintiffs alleged that this approach is mandatory to avoid invidious discrimination against indigent defendants,[293] held that less restrictive requirements may meet federal constitutional standards.[294]

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[286] The constitution provides that "[e]xcessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great." MISS. CONST. art. 3, § 29. Although this section does not specifically provide that bail must be granted, subsequent case law has so held. *See Ex parte* Dennis, 334 So. 2d 369, 371 (Miss. 1976) (constitutional right to bail is in keeping with the public policy of Mississippi); Resolute Ins. Co. v. State, 233 So. 2d 788, 789-90 (Miss. 1970) (bail is fundamental right, constitutionally protected, which furthers the public interest); *Ex parte* Oliver, 127 Miss. 208, 215, 89 So. 915, 916 (1921) (because of ease of locating and returning defendants for trial, bail is favored by state's public policy). For a study of the historical development of the bail concept, see 44 MISS. L.J. 556 (1973).

[287] *See* Royalty v. State, 235 So. 2d 718, 720 (Miss. 1970) (excessive bail violates constitutional protection of defendant who has not been convicted and who is presumed innocent).

[288] *Ex parte* Dennis, 334 So. 2d 369, 371 (Miss. 1976). *See* Langston v. State, 373 So. 2d 611, 613 (Miss. 1979) (petition for habeas corpus alleging refusal of bond denied because of accused's past convictions and high probability of his absconding); Brown v. State, 217 So. 2d 521, 523 (Miss. 1969) (probability of accused's appearance for trial is to be taken into consideration in setting bail); *Ex parte* Oliver, 127 Miss. 208, 215, 89 So. 915, 916 (1921) (bond must be reasonable and based on the character of the offense charged).

[289] Wells v. State, 288 So. 2d 860, 863 (1974) (judgment will not be disturbed without showing of manifest error or abuse of discretion). *See* Street v. State, 43 Miss. 1, 27 (1870) (trial court's decision on bail is presumed correct until error is shown).

[290] 18 U.S.C. § 3146 (1970) (the Bail Reform Act). *See* Annot., 78 A.L.R.3d 780, 784 (1977) (commenting on the Act).

[291] *See* Annot., *supra* note 290 (generalizing as to provision of these acts). Mississippi has not enacted such a provision.

[292] 572 F.2d 1053 (5th Cir. 1978).

[293] *Id.* at 1057 n.7.

In 1979, in *Lee v. Lawson,*[295] on appeal from denial of a habeas corpus petition, the court considered an indigent defendant's claim that the Mississippi bail statute[296] violated the due process and equal protection clauses of the federal constitution.[297] The court, noting that Mississippi's bail system is not based on monetary bail alone,[298] indicated that a standard providing for release of defendant on order to appear or on her own recognizance in other than violent crimes[299] should govern the setting of bail.[300] Since the record failed to disclose that the trial judge had considered alternative forms of release in imposing a monetary bail requirement, the case was remanded to consider the question of bail,[301] with the court delineating specific factors to be considered in determining if there was a substantial risk of nonappearance.[302]

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[294] *Id.* at 1058. The court upheld a Florida rule of procedure which did not give preference to release or recognizance. FLA. R. CRIM. PRO. 3.130. Noting that pretrial confinement of an indigent for inability to post money bail would constitute an excessive restraint if his presence at trial could be reasonably assured in another way, the court held that the Florida rule did not mandate such action. 572 F.2d at 1058.

[295] 375 So. 2d 1019 (Miss. 1979).

[296] MISS. CODE ANN. § 99-5-1 (1972).

[297] 375 So. 2d at 1020. Appellant was 19 years old and had been incarcerated for approximately six months because of her inability to raise the 10% of her $2500 bond required by a professional bail bondsman before he would post bond. *Id.* at 1021.

[298] *Id.* at 1023. *See* MISS. CODE ANN. §§ 99-5-11, -15-3 (1972) (empowering conservators of the peace to take all manner of bonds and recognizances). The court noted that any system based on monetary bail alone was unconstitutional. 375 So. 2d at 1023.

[299] Petitioner was charged with aggravated assault. 375 So. 2d at 1020.

[300] The court stated: "The American Bar Association Project on Minimum Standards Relating to Pretrial Release serves as a guide to the conservator in the release decision . . . . There is incorporated in these standards a presumption that a defendant is entitled to be released on order to appear or on his own recognizance." *Id.* at 1024.

[301] *Id.*

[302] These factors are:

(1) the length of his residence in the community;
(2) his employment status and history and his financial condition;
(3) his family ties and relationships;
(4) his reputation, character, and mental condition;
(5) his prior criminal record, including any record of prior release on recognizance or on bail;
(6) the identity of responsible members of the community who would vouch for defendant's reliability;
(7) the nature of the offense charged and the apparent probability of convic-

It appears that the court has, in this decision, established guidelines favoring the presumption of release on recognizance for nonviolent crimes, dependent upon the trial judge's finding that this will ensure appearance at trial.[303] The court has defined the factors to be used in this determination, and the holding appears to be consistent with the opinion of the Court of Appeals for the Fifth Circuit.[304] The state legislature should amend the bail bond statutes to provide for this procedure, since they do not currently contain comprehensive guidelines for setting bail.[305]

D. General Procedure for Trial Practice

In 1979, the Mississippi Supreme Court handed down a number of decisions dealing generally with trial practice and procedure. The majority of these cases affirmed well-recognized rules, while a few set new standards. This portion of the commentary attempts to categorize those decisions, with limited elaboration.

In several cases dealing with the selection of grand jury foremen, the supreme court held that appellants must strictly satisfy the requirements established in 1979 by the United States Supreme Court in *Rose v. Mitchell*[306] before discrimination will be found.[307] Under *Rose*, those challenging the selection

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> tion and the likely sentence, insofar as these factors are relevant to the risk of non-appearance; and
>
> (8) any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

Id.

[303] This is consistent with the purpose for bail requirements. *See* note 288 and accompanying text *supra.*

[304] *See* notes 292 through 294 and accompanying text *supra.*

[305] 375 So. 2d at 1024.

[306] 443 U.S. 545 (1979).

[307] Rasco v. State, 378 So. 2d 211, 214 (Miss. 1979) (motion to quash properly denied when census report was only proof produced by appellant); Moore v. State, 375 So. 2d 1044, 1045 (Miss. 1979) (no statistical evidence offered as to number of potential black jurors or percentage of blacks in total county population); Thompson v. State, 375 So. 2d 233, 234 (Miss. 1979) (appellant failed to meet standards established in *Rose*); White v. State, 374 So. 2d 843, 846 (Miss. 1979) (no basis of comparison between number of blacks in county population and number called to serve as grand jury foremen); Herring v. State, 374 So. 2d 784, 787-88 (Miss. 1979) (applying *Rose* criteria, appellant failed

process must determine the proportion of the group discriminated against to the total population and compare this with the proportion called to serve as foremen over a significant period.[308] As for indictments returned by the grand jury, the Mississippi Supreme Court held that the Mississippi statute providing for the foreman's affidavit to the indictment[309] need not be strictly complied with where the common law procedure for presenting grand jury indictments has been satisfied.[310]

Many cases decided in 1979 reaffirmed well-established rules. The court rendered several decisions dealing with selection of a trial jury[311] and qualifications of jurors.[312] Also considered were cases addressing the right to effective counsel[313] and

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to make prima facie case of discrimination).

[308] 443 U.S. at 565 (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

[309] Miss. Code Ann. § 99-7-9 (Supp. 1979). The affidavit must show that at least 12 members of the jury concurred in all indictments and that a minimum of 15 members was present for all deliberations.

[310] *See* McCormick v. State, 377 So. 2d 1070, 1074 (Miss. 1979) (despite absence of affidavit, indictment not deficient since entire grand jury filed indictment and no prejudice to defendant shown); Stewart v. State, 377 So. 2d 1067, 1068 (Miss. 1979) (indictment not demurrable when all members of grand jury present at its return and indictment endorsed by foreman and filed by clerk); Jackson v. State, 377 So. 2d 1060, 1061 (Miss. 1979) (no prejudice from foreman's failure to complete affidavit) (citing *McCormick*). *See also* Usry v. State, 378 So. 2d 635, 639 (Miss. 1979) (citing *Jackson*); Shaw v. State, 378 So. 2d 631, 634 (Miss. 1979) (citing *Jackson* and *McCormick*). The court's reasoning is supported by Temple v. State, 165 Miss. 798, 145 So. 749 (1933), which held that the return of an indictment raised the presumption that all legal requirements had been complied with. *Id.* at 804-06, 145 So. at 750-51.

[311] *See* Coleman v. State, 378 So. 2d 640, 645 (Miss. 1979) (upholding use by state of eleven peremptory challenges against prospective black jurors, resulting in jury makeup of eleven whites and one black); Gray v. State, 375 So. 2d 994, 999-1000 (Miss. 1979) (no error in rejection of defendant's motion for "jury box" voir dire when no showing of prejudice by use of the "Stennis" panel method); Sellen v. State, 374 So. 2d 781, 782 (Miss. 1979) (failure to comply with statute, requiring that accused be provided with full jury panel before calling on him to make peremptory challenges, is reversible error); Atkinson v. State, 371 So. 2d 869, 870 (Miss. 1979) (delineating standards for determining whether party is prejudiced by juror's failure to respond to question on voir dire); Page v. State, 369 So. 2d 757, 760 (Miss. 1979) (to prove discrimination, must show practice of omission of certain groups from juries).

[312] *See* Walls v. State, 371 So. 2d 411, 412-13 (Miss. 1979) (in murder prosecution, reversible error not to replace juror whose son had recently been homicide victim). *See also* Dase v. State, 356 So. 2d 1179, 1181-82 (Miss. 1978) (juror's son had been victim of fatal stabbing).

[313] *See* King v. State, 374 So. 2d 808, 812 (Miss. 1979) (accused cannot complain of inadequate representation of counsel when they are of his own choosing); Thornton v.

the right of an attorney to withdraw from a criminal case.[314] In several decisions, the court noted jury instructions which should not have been given,[315] and those which were permissible under the facts of the particular cases.[316] Other cases dealt with the conduct of the trial[317] and with sentencing.[318]

State, 369 So. 2d 505, 507 (Miss. 1979) (accused in criminal proceeding has right to effective counsel).

[314] *See* Brewer v. State, 373 So. 2d 818, 820-21 (Miss. 1979) (motion of attorney of record to withdraw from representation of one co-defendant must be granted upon showing of conflict of interest).

[315] *See, e.g.,* White v. State, 375 So. 2d 220, 221-22 (Miss. 1979) (instruction that prosecutrix's uncorroborated and unsupported testimony should be viewed with caution goes to the weight of the evidence); Phillips v. State, 374 So. 2d 824, 826 (Miss. 1979) (instruction that accused is competent to testify and jury has no right to disbelieve his testimony should be given only when his testimony is the only direct evidence and the prosecution is based on circumstantial evidence); McDougle v. State, No. 51,368 slip op. at 5-6 (Miss. Aug. 29, 1979) (defendant not entitled to instruction that if his testimony shows self-defense and is not contradicted directly or inferentially, the jury must accept his explanation as true), *aff'd,* 374 So. 2d 807 (Miss. 1979); Sanford v. State, 372 So. 2d 276, 279 (Miss. 1979) (alibi instruction should not be given if it lacks particular time setting and evidentiary support); McBride v. State, 366 So. 2d 666, 667 (Miss. 1979) (instruction stating facts that prosecution must prove should not be given); Minor v. State, 366 So. 2d 238, 240 (Miss. 1979) (instruction that failure to flee from scene of the crime may be considered circumstantial evidence of accused's innocence is proper only when accused did not flee the scene of the crime). *See also* Buford v. State, 372 So. 2d 254, 256 (Miss. 1979) (accused may not complain of instruction given at his request).

[316] *See, e.g.,* Crump v. State, 375 So. 2d 225, 227 (Miss. 1979) (one convicted of manslaughter under a murder indictment cannot complain of the giving of a murder instruction); Arrington v. State, 366 So. 2d 246, 248 (Miss. 1979) (court's refusal to give self-defense instruction that jury should put themselves in defendant's place is not reversible error where curative instructions are given).

[317] *See, e.g,* Durham v. State, 377 So. 2d 909, 910 (Miss. 1979) (where good cause for delay was shown, trial conducted 584 days after arraignment was permissible). *See also* MISS. CODE ANN. § 99-17-1 (Supp. 1979) (requiring trial no later than 270 days after arraignment unless good cause shown).

[318] *See* Coleman v. State, 378 So. 2d 640, 646, 650 (Miss. 1979) (upholding state's capital murder statute, but remanding for modification of sentence since trial judge refused to allow introduction of mitigating circumstances in sentencing portion of constitutionally mandated bifurcated trial); Whittington v. State, 377 So. 2d 927, 929 (Miss. 1979) (case remanded because sentence on two counts unclear as to whether term applied to one or both counts); Horton v. State, 374 So. 2d 764, 765 (Miss. 1979) (imposition of sentence of life imprisonment for rape does not constitute cruel and unusual punishment); Stewart v. State, 372 So. 2d 257, 258-59 (Miss. 1979) (trial judge may not fix a sentence at a term tantamount to a life sentence when imposition of a life sentence is solely within the jury's discretion) (overruling in part McAdory v. State, 354 So. 2d 263, 266 (Miss. 1978), and adopting the rationale of Lee v. State, 322 So. 2d 751, 753 (Miss. 1975)).

At this point, it should be noted that the Mississippi Supreme Court, under its rule-making powers,[319] has adopted a set of uniform criminal rules for use in the circuit courts.[320] The supreme court has advised attorneys and trial judges to familiarize themselves with these rules;[321] additionally, the court criticized various practices of trial attorneys,[322] district attorneys[323] and trial judges.[324]

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[319] *See* Newell v. State, 308 So. 2d 71, 76-77 (Miss. 1975) (acknowledging this inherent power).

[320] Mississippi Uniform Criminal Rules of Circuit Court Practice. These rules were adopted by order of the court on August 15, 1979. 370-74 So. 2d xxxvi (Miss. Cas. 1979).

[321] *See* Usry v. State, 378 So. 2d 635, 638-39 (Miss. 1979) (trials held in circuit court must be held in accordance with rules adopted by the supreme court); Barnes v. State, 374 So. 2d 1308, 1309 (Miss. 1979) (previous case law modified to conform with guidelines for jury sequestration set out in Rule 5.07).

[322] *See* Stewart v. State, 377 So. 2d 613, 614 (Miss. 1979) (where trial attorney signed agreement that stenographic notes were correct and did not object to diminution in record, suggestion of diminution of record overruled); Thomas v. State, 377 So. 2d 593, 594 (Miss. 1979) (for purposes of appeal, defendant waives overruling of motion for directed verdict by subsequently putting on evidence); Woodfork v. State, 377 So. 2d 912, 914 (Miss. 1979) (where defendant testified in his own behalf after his motion for directed verdict was overruled, denial of motion could not be assigned as error); Medious v. State, 375 So. 2d 405, 406 (Miss. 1979) (defendant could not contend on appeal that verdict was against the overwhelming weight of evidence when he had made no motion for new trial on this ground); King v. State, 374 So. 2d 808, 812 (Miss. 1979) (no error for failure to sequester jury when defense attorney does not move for sequestration). In several cases the supreme court reaffirmed its rule that objections to jury instructions must be specific if the party intends to raise the granting of the instruction as error. DePriest v. State, 377 So. 2d 615, 617 (Miss. 1979); Collins v. State, 368 So. 2d 212, 213 (Miss. 1979). *But see* Culberson v. State, 379 So. 2d 499, 506 (Miss. 1979) (in capital murder case, court may consider error in state's instruction although trial counsel did not object to instruction).

[323] *See* Bennett v. State, 374 So. 2d 803, 806 (Miss. 1979) (district attorney risks reversal in not seeking proper jury instructions); White v. State, 374 So. 2d 225, 227 (Miss. 1979) (when facts constituting a criminal offense fall under either of two statutes, or where there is substantial doubt as to which of the two is to be applied, the statute imposing the lesser punishment will be applied); Ramseur v. State, 368 So. 2d 842, 844 (Miss. 1979) (state is not obliged to furnish witness list to defendant).

[324] *See* Coleman v. State, 378 So. 2d 640, 650-51 (Miss. 1979) (Lee, J., dissenting) (in capital murder case, judge must recuse himself where he has an interest in the outcome of the case); Fermo v. State, 370 So. 2d 930, 933 (Miss. 1979) (trial judge should not enter into plea bargaining); Morgan v. State, 370 So. 2d 231, 232 (Miss. 1979) (if juror expresses dissatisfaction with verdict on jury poll, it is reversible error to quiet him, because such action results in a questionable verdict leading to the conclusion that no unanimous verdict was reached); Ballard v. State, 366 So. 2d 668, 668 (Miss. 1979) (defendant is entitled to argue his case to the jury in open court, and refusal to allow him to do so is reversible error); Johns v. State, 366 So. 2d 244, 245-46 (Miss. 1979) (though

E. Legislative Enactments

In the 1979 session, the Mississippi legislature passed several bills pertaining to criminal law and procedure. Among these were statutes providing for the forfeiture and disposition of property seized under the Mississippi Uniform Controlled Substances Law[325] and for the forfeiture, upon conviction, of weapons used in the commission of crimes.[326] The legislature also passed bills governing restitution by offenders placed on probation or released on parole or earned probation,[327] and governing the imposition and collection of fines with regard to indigents convicted of criminal offenses.[328]

Other enactments defined sexually oriented material as harmful to minors, prohibited their sale and exhibition,[329] and forbade persons to cause or knowingly permit a child to engage

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defendant's thwarted attempt to plead guilty in open court was not reversible error under the circumstances, procedures should be devised to prevent such occurrences).

[325] 1979 Miss. Laws, ch. 473 (amending MISS. CODE ANN. § 41-29-153 (1972)).

[326] 1979 Miss. Laws, ch. 396 (amending MISS. CODE ANN. § 97-37-3 (1972)). This enactment provides that the weapon may be introduced into evidence and that, on conviction, the weapon is forfeited and disposed of. On dismissal or acquittal, the weapon is returned. Coverage is extended to weapons used in the commission of any crimes, not limited to the crime of carrying a deadly weapon.

[327] 1979 Miss. Laws, ch. 462 (amending MISS. CODE ANN. §§ 47-5-161, 99-37-5,-15 (1972)). This enactment requires such offenders, those under the supervision of the Department of Corrections, and those participating in work release programs, to pay $10 per month to the Mississippi Department of Corrections. Further, the act abolished the requirement that the Commissioner of Corrections retain this amount from the wages of work release participants, and provides that offenders who fail to make court-ordered restitution may have their probation or participation in such programs revoked.

[328] 1979 Miss. Laws, ch. 501 (codified at MISS. CODE ANN. § 99-19-20 (Supp. 1979)). Where a court imposes a sentence on a defendant, the court may order a fine to be paid immediately or in installments, or that payment be a condition of probation, or that the convicted offender be required to work on public property for public benefit, or any combination of these. The offender may be imprisoned until the fine is paid (not to exceed one day for each $10 of the fine) only if he is financially able to pay the fine. This provision amends MISS. CODE ANN. §§ 47-1-47 (1972) and 99-37-9 (Supp. 1978).

[329] 1979 Miss. Laws, ch. 475 (repealing MISS. CODE ANN. §§ 97-5-13 to -19, -35 (1972)). This act proscribes dissemination of sexually oriented material to minors, prohibits intentional and knowing public display of such material, and sets penalties for failure to comply at not less than $500 nor more than $5,000, or imprisonment for not more than one year in the county jail, or both. Additionally this law rescinds the prohibition against previews of restricted motion pictures at the showing of films rated for general audiences.

in defined sexual conduct or simulations of such conduct.[330] The legislature also increased the penalty for the false reporting of bombs.[331]

In the evidentiary field, a provision was enacted to allow the certificate of a physician's, chemist's, or technician's analysis of a controlled substance to be admitted as evidence in a criminal prosecution when the testimony of such person is called for.[332] The enactment also provides that, on timely motion made by any party, the court may order such persons to appear as witnesses.[333] This will ensure a cost savings to both the prosecution and the defense in providing expert witnesses for trial, while preserving the right to have such witnesses produced if any controversy arises concerning their reports.

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[330] 1979 Miss. Laws, ch. 479 (codified at Miss. Code Ann. §§ 97-5-33, -35 (Supp. 1979)). Also prohibited are the filming or otherwise recording of such conduct, and the transportation, shipping, mailing, or distributing for sale of material depicting such conduct. Failure to comply constitutes a felony, punishable by a fine of not less than $25,000 nor more than $50,000, and imprisonment for not less than two years nor more than twenty years.

[331] 1979 Miss. Laws, ch. 485 (amending Miss. Code Ann. § 97-37-21 (1972)). Penalties are increased to not more than $5,000 or imprisonment with the State Department of Corrections for not more than five years, or both.

[332] 1979 Miss. Laws, ch. 389 (codified at Miss. Code Ann. § 13-1-114 (Supp. 1979)). The certificate constitutes evidence of the results of the analysis, provided the analysis is conducted in a court-approved laboratory and the certificate is duly attested by the person performing the analysis.

[333] Miss. Code Ann. § 13-1-114 (Supp. 1979).

INSURANCE

In 1979, the Mississippi Supreme Court[1] and the Mississippi Legislature[2] did not make substantial alterations in the status of insurance law in this state. Notwithstanding a general adherence to established precedents, the court did break new ground in certain areas. Following is an interpretation of those changes by the judiciary, as well as an analysis of significant legislative enactments relevant to the respective areas.

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[1] Decisions of lesser import rendered in the 1979 term were: Paul Revere Life Ins. Co. v. Prince, 375 So. 2d 417, 418-19 (Miss. 1979) (where terms of policy are clear and unambiguous, policy to be construed like any other contract); Colonial Life & Accident Ins. Co. v. Cook, 374 So. 2d 1288, 1289-90 (Miss. 1979) (insurer entitled to peremptory instruction that policy limits had been satisfied, where insured endorsed check with release form on back, thereby resulting in accord and satisfaction); Seago v. Home Ins. Co., 373 So. 2d 808, 810 (Miss. 1979) (where insured failed to furnish notice of change of property coverage under casualty policy, there was no mutual mistake, but rather fault lay with insured and recovery was denied); Dixie Nat'l Life Ins. Co. v. Allison, 372 So. 2d 1081, 1084 (Miss. 1979) (where policy required a diagnosis of cancer based upon microscopic examination of fixed tissue, but such test would endanger patient's life, failure of insured to comply with policy provisions is excused, and payment under policy required); Subscribers Cas. Reciprocal Exch. v. Totaro, 370 So. 2d 1342, 1343 (Miss. 1979) (in action by insured to recover for disability provisions in policy, testimony of physician as to insured's condition was substantial evidence to show termination of total disability); National Security Fire & Cas. Co. v. Mid-South Homes, Inc., 370 So. 2d 1351, 1354 (Miss. 1979) (in action by mortgagee against insurer to recover amount of mortgage on burned structure, provision in policy for automatic cancellation for nonpayment of annual premium by mortgagor was ineffective as to mortgagee); Cruse v. Aetna Life Ins. Co., 369 So. 2d 762, 764 (Miss. 1979) (where insured employee was required to work two continuous months under group life insurance policy, insured was not required to complete last day of period either by working or surviving, and temporary layoff of insured was not interruption of period so as to bar insured's dependents from policy benefits for insured's death); State Farm Fire & Cas. Co. v. Magee, 368 So. 2d 230, 232 (Miss. 1979) (evidence of a reasonable investigation by an administrator of a deceased motorist's estate is admissible to show a prima facie case of existence of decedent's policy in insured's action against insurer under uninsured motorist coverage provision); United States Fidelity & Guar. Co. v. Hillman, 367 So. 2d 914, 922 (Miss. 1979) (insured does not have right to recover policy amount from insurer, where insured, without consent of insurer and in violation of policy terms, obtained a release from third party and thus destroyed insurer's right of subrogation); Williams v. Life Ins. Co., 367 So. 2d 922, 925 (Miss. 1979) (employee's policy for double indemnity benefits with employer held to be group policy within the meaning of MISS. CODE ANN. § 83-9-17 (1972); and thus, the six year statute of limitations provided in *id.* § 15-1-49 (1972) controls); Dunnam v. State Farm Mut. Auto Ins. Co., 366 So. 2d 688, 670-71 (Miss. 1979) (in question of priority between subrogation lien of insurer and judgment lien of insured to assets of uninsured motorist judgment debtor, MISS. CODE ANN. § 83-11-107 (1972) gives insurer priority).

[2] Statutes enacted by the Mississippi Legislature in 1979 pertinent to the field of insurance and not treated in detail elsewhere include: H.R. 843, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 318, 1979 Miss. Laws, *codified at* MISS. CODE ANN. § 63-9-27 (Supp. 1979) (excluding felonies and liquor or drug related driving offenses, act provides

I. Punitive Damages for Wrongful Refusal to Settle First Party Claims

As a general principle, an insurance policy between an insurer and an insured is actually a contract of indemnification.[3] Consequently, established axioms of contract law usually control insurance remedies.[4] The strict construction of *Hadley v. Baxendale*[5] teaches that in the event of breach of a contract, the remedy is restricted to those damages reasonably within the contemplation of the parties at the time of contracting.[6] As a result,

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for fidelity and surety insurance companies to issue guaranteed arrest bond certificates not to exceed $200.00 to their insureds in supplementation of Miss. Code Ann. § 63-9-25 (1972); H.R. 1211, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 312, 1979 Miss. Laws, *codified at* Miss. Code Ann. §§ 75-49-5, -7 (Supp. 1979) (provides for proper anchoring and blocking of new and used manufactured mobile homes and gives the Commissioner rule-making power and investigative power to determine compliance); H.R. 158, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 314, 1979 Miss. Laws, *codified at* Miss. Code Ann. §§ 83-7-23, -25 (Supp. 1979) (to adjust statutory interest rates on certain insurance policies, to increase maximum permissible age setback for females for life insurance from three to six years, to define commissioners' annuity reserve valuation method, and to modify commissioners' reserve valuation method for policies under which the gross premium actually payable is less than valuation net premium); H.R. 887, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 435, 1979 Miss. Laws, *codified at* Miss. Code Ann. § 83-9-33 (Supp. 1979) (requires all individual and group health insurance policies providing coverage on an expense-incurred basis for members of insured's family to include benefits for newborn children with difficulties); H.R. 496, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 469, 1979 Miss. Laws, *codified at* Miss. Code Ann. § 83-41-213 (Supp. 1979) (under any medical service plan or hospital service contract providing for reimbursement for services within lawful scope of practice of duly certified nurse practitioner under supervision of licensed physician, nurse is entitled to reimbursement for services whether performed by the physician or by nurse under physician's supervision).

[3] 12 J. Appleman, Insurance Law and Practice § 7001, at 3 (1943 & Supp. 1978).

[4] *Id. See* Ulledalen v. United States Fire Ins. Co., 74 N.D. 589, 23 N.W.2d 856, 867 (1946) (essential elements of a contract of insurance are same as those of contracts generally).

[5] 156 Eng. Rep. 145 (Ex. 1854).

[6] Under the rule of *Hadley,* damages of a general nature are not foreseeable. *Id.* The specific consequences of the breach must be foreseen at the time the contract was entered into in order to be recoverable. *See, e.g.,* Leonard v. Fireman's Ins. Co., 100 Ga.

the only remedy usually open to the insured for breach by the insurer is confined to the amount due under the policy plus interest.[7]

In a majority of states, punitive damages are not recoverable for breach of an insurance contract.[8] Consequently, in those states insurers are free to play economic politics in delaying payment[9] of legitimate first party claims.[10] On the other hand, the Mississippi Supreme Court is part of a burgeoning movement[11]

App. 434, 435, 111 S.E.2d 773, 775 (1959) (damages of tree falling on car in rainstorm were too remote); Independent Grocery Co. v. Sun Ins. Co., 146 Minn. 214, 217, 178 N.W. 582, 583 (1920) (loss of trade, inability to pay creditors, and loss of business good will did not proximately flow from policy covering loss of goods by casualty).

[7] New Orleans Ins. Co. v. Piaggio, 83 U.S. (16 Wall.) 378, 386 (1872); Reichert v. General Ins. Co. of America, 68 Cal. 2d 822, 851, 442 P.2d 377, 394, 69 Cal. Rptr. 321, 338 (1968) (dissenting opinion); Haas v. Pacific Mut. Life Ins. Co., 70 Ohio App. 332, 335-36, 41 N.E.2d 263, 264-65 (1941).

[8] Comment, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend,* 45 Fordham L. Rev. 164, 164 (1976-77) (insurer can engage in intentional and unreasonable delay in honoring a first party claim and insured has no redress). Despite any anguish, harassment, or financial hardship the insured undergoes, the insurer is cognizant that an insured's potential recovery is strictly confined to face amount of the policy plus interest. 16 J. Appleman, *supra* note 3, § 8881, at 633-35. For an insurer's justification of this position, see Note, *Damages Assessed Against Insurers for Wrongful Failure to Pay,* 10 Wm. & Mary L. Rev. 466, 475 (1968) (insurer argues that it must be able to calculate the risk it undertakes, and if liability were imposed for amounts beyond face value of the policy, then would result in higher premiums to public).

[9] In balking on payment of bona fide claims and remaining ensconsed in its superior bargaining position in anticipation of an unfair settlement, the insurer encounters no greater risk of loss than if it had honored the claim when initially presented. 13 Wake Forest L. Rev. 685, 685-86 (1977); *see* Lawton v. Great S.W. Fire Ins. Co., 118 N.H. 607, 392 A.2d 576, 579 (1978) ("To limit the insurer's liability to the policy limits plus interest as a matter of law would unnecessarily encourage insurers to delay settlement in an attempt to coerce a financially pressured claimant into accepting an unfair settlement because its only liability would be to pay its original obligation and interest."). As a practical matter, since commercial interest rates are greater than statutory rates, the insurer can enjoy a measurable profit from investing the withheld amount. Wall St. J., Jan. 30, 1980, at 31, col. 6 (money rates schedule indicated around 13% average rate for certificates of deposit at major banks with minimum deposit of $100,000.00).

[10] First party insurance involves a policy that indemnifies the insured for his own personal loss. Third party insurance involves a policy that covers the insured's liability to third parties for their personal injury or property damage due to the insured's negligence. *See* Comment, *supra* note 8, at 164 n.1.

[11] California was the birthplace of this trend. The courts required that should the insurer refuse to settle a claim, it must entertain a good faith belief in its rights under the policy. *See, e.g.,* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 460-61, 521 P.2d

to allow the insured to recover punitive damages when the insurer engages in such conduct.[12]

For a long time, the Mississippi Supreme Court held that in an action grounded on breach of contract, recovery of punitive damages was allowed where the conduct surrounding the breach

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1103, 1108-09, 113 Cal. Rptr. 711, 716-18 (1974) (under medical insurance policy insured could recover punitive damages where he could in fact, not by implication, show that insurer intended to be vexatious, injurious, and annoying to insured in disregard of insured's right); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 571-72, 575, 510 P.2d 1032, 1035, *ad nauseum*, 108 Cal. Rptr. 480, 483, 486 (1973) (insurer's statements to arson investigator that insured had excessive insurance, denial of coverage because of insured's refusal to submit to examination while arson charges pending, and adjuster's testimony at preliminary hearing, were not acts made in good faith, but rather were malicious attempts to deprive insured of fire insurance policies' benefits); Richardson v. Employer's Liab. Assurance Corp., 25 Cal. App. 3d 232, 239, 102 Cal. Rptr. 547, 552 (1972) (viewing uninsured motorist claims as first party and not adversary in nature, court found insurer had violated implied-in-law covenant of good faith and fair dealing between insurer and insured by withholding payment for months, while cognizant that claim was valid, and by trying to negotiate better settlement after arbitration award); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 408-09, 89 Cal. Rptr. 78, 99 (1970) (insurer held liable for tort of intentional infliction of emotional distress where insurer, in breaching contract, asserted own economic interest in outrageous manner). *See generally* DuBois & Bronson, *Spectre of Punitive Damages in First Party Actions* (pt. 1), 40 INS. COUNSEL J. 242 (1975); Parks & Heil, *Tort of "Bad Faith"—The Impact of Gruenberg v. Aetna Insurance Company,* 24 FED'N OF INS. COUNSEL Q. No. 3, at 3 (1973-74); Levit, *California Supreme Court Holds Insurer Guilty of Bad Faith But Denies Punitive Damages,* 1974 INS. L.J. 321; Volz, *New Tort of Outrage,* 36 ALA. LAW. 568 (1975).

[12] *See, e.g.,* Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 821-22, 598 P.2d 452, 458, 157 Cal. Rptr. 482, 488 (1979) (evidence revealing insurance adjuster's unsupported denial of disability coverage to hospitalized insured with totally disabled wife and 12-year-old child was sufficient to show insurer's malicious intent to oppress insured in conscious disregard of his rights); Sexton v. Meridian Mut. Ins. Co., 337 N.E.2d 527, 529 (Ind. App. 1975) (insurer's failure to negotiate expeditiously and settle insureds' claim, in addition to refusing to recognize an umpire's award exceeding insured's appraisal, were sufficient pieces of evidence to justify submission to jury to decide if "conduct of the wrongdoer indicated a heedless disregard of the consequences, malice, gross fraud, or oppressive conduct"); Progressive Cas. Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975) (punitive damages for breach of contract allowed where breach is accompanied "by intentional wrong, insult, abuse, or such gross negligence as to consist of an independent tort"); Christian v. American Home Assurance Co., 577 P.2d 899, 904-05 (Okla. 1977) (court recognized breach of insurer's "implied duty to deal fairly and act in good faith" would result in liability for punitive damages in appropriate case).

Some states have treated the question with statutory measures. *See, e.g.,* ARK. STAT. ANN. § 66-3238 (1966) (penalties for failure of insurer to pay); GA. CODE ANN. § 56-1206 (1977) (same); LA. REV. STAT. ANN. § 22:656 (West 1977) (same); MO. ANN. STAT. § 375.420 (Vernon Supp. 1979) (same); TENN. CODE ANN. § 56-1105 (1968) (same).

was so great as to amount to a separate and independent tort.[13] In 1975, the supreme court for the first time applied this approach to breaches of insurance contracts.[14] The court formulated a test allowing recovery where the "breach is attended by intentional wrong, insult, abuse, or such gross negligence as to consist of an independent tort."[15]

In the 1979 term, the supreme court decided two cases which helped to add an element of predictability to this otherwise gray area.[16] In *Travelers Indemnity Co. v. Wetherbee,*[17] the insurer delayed payment to the insureds under a fire insurance policy covering their dwelling, contents and any additional living expenses incurred during repairs.[18] After numerous protracted attempts to secure payment of the policy limits, the insureds brought an action for the amount of the policy, and for punitive damages under the independent tort theory.[19] The trial court rendered a verdict for the insureds, and the insurer appealed, contending, *inter alia,* that the instruction for punitive damages was not supported by the evidence.[20] The supreme court affirmed the jury's award of punitive damages, citing a series of inexplicable delays by the insurer in settling the claim[21] and the unambiguous terms of the policy calling for payment within sixty days of proof of loss.[22]

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[13] *See* D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 221-22, 16 So. 2d 770, 773 (1944) (where employee of lessor violated lease by destroying fences and allowing lessee's cattle to escape, and lessor knew of damage but did nothing, such conduct was independent tort warranting punitive damages); American Ry. Express v. Bailey, 142 Miss. 622, 630-31, 107 So. 761, 763 (1926) (where bank failed to send proper currency to tourist stranded abroad, such action did not substantiate claim for punitive damages); Hood v. Moffett, 109 Miss. 757, 764-65, 69 So. 664, 666 (1915) (under patient's contract with physician to deliver child, failure of physician to do so was not sufficient for claim of punitive damages as separate tort).

[14] Progressive Cas. Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975). Noting that the insured had improperly tried to combine an action for breach of the insurance contract with an action for a tort (the insurer's refusal to comply with the settlement provision in the contract), the *Keys* court held that in an action for breach of an insurance policy, the test for punitive damages, applied to other contract actions, was to control. *Id.*

[15] *Id.*

[16] *See* notes 28 through 31 and accompanying text *infra.*

[17] 368 So. 2d 829 (Miss. 1979).

[18] The Wetherbees assumed a mortgage in early 1975, and renewed coverage on their house, with an increase, in that same year. The policy limits provided $20,000.00 on the dwelling, $6,000.00 on contents, and $2,000.00 extra living expenses in the event of loss. *Id.* at 830.

[19] The following chain of events led to the filing of the action: 2-14-76: house severely damaged by fire; 2-17-76: reported to Travelers and draft issued for $500.00; 2-17-76: Travelers' adjuster inspected burned structure, was told by fire marshall that Wetherbee was suspected of arson in burning of his home, and submitted report of such; 3-21-76: Travelers cancelled policy and refused payment during course of arson investigation; 3-31-76: after having to move into low income housing project and continue to make mortgage payments, Wetherbees engaged attorney to settle claim; 3-23-76: Trav-

A few months later, the supreme court decided *Aetna Casualty and Surety Co. v. Steele.*[23] After the insured's pickup had been damaged on the night of purchase, a claim under the collision portion of his insurance policy was made and, subsequently, was denied by the liability insurer for lack of coverage.[24] Mr. Steele, the insured, in an action on the policy, received a judgment against the insurer, both as to the assessed value of the truck and on his claim of punitive damages for wrongful failure to settle.[25] The supreme court held that there was coverage

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elers got estimate of $14,137.24; 4-13-76: after writing Travelers that clients were anxious to settle, attorney submitted estimate of $23,889.38, sum exceeding policy limit, and also requested payment of extra living expenses coverage; 5-21-76: attorney again wrote Travelers requesting settlement with no response; 5-25-76: fire marshall's report exonerated Wetherbees of arson, and investigation terminated; 5-27-76: adjuster attempted to make settlement offer on both dwelling and contents coverage together, but was well below policy limits on Wetherbees' estimate; 7-23-76: Wetherbees obtained new attorney, who wrote Travelers on this date and again on 9-1-76, requesting prompt settlement of contents and additional living expenses coverage, over which, Travelers representative later testified, there was no dispute; 12-21-76: Wetherbees filed action against Travelers for policy limits plus punitive damages; 2-4-77: Travelers tendered payment for contents coverage. *Id.* at 830-34.

[20] The court noted that even though the bargaining position of the parties offered the "opportunity for economic pressure," this fact could not be inferred but must be supported by the evidence. *Id.* at 833.

[21] The court noted that this was the primary reason for its conclusion that the punitive damages instruction was supported by the evidence. *Id.* at 834. *See* note 19 *supra.*

[22] The court was persuaded by the fact that the requirement of payment within sixty days of proof of loss was clear and unambiguous, but nevertheless was not adhered to by the insurer. The court observed that even though Travelers was reasonable in not honoring the claim pending the outcome of the arson investigation, it was clearly unjustified in refusing payment after repeated demands and full knowledge of the loss. The payment for the contents coverage was not tendered until 190 days after the 60-day period had expired. 368 So. 2d at 834-35.

[23] 373 So. 2d 797 (Miss. 1979).

[24] *Id.* at 798-99.

[25] The judge, sitting without a jury, found the insurer liable for $3,100.00, for the value of the truck, and $35,000.00 in punitive damages. *Id.* at 798.

under the policy, but reversed the lower court's finding of punitive damages.[26] The court found that the clauses in question were of an ambiguous nature, and, consequently, the award of exemplary damages was improper.[27]

When these two decisions are analyzed with all the other cases on the subject since the court's first pronouncement,[28] there are discernible criteria upon which the court relies in determining whether or not punitive damages should lie. The cases appear to have fallen into three distinct categories. First, where facts reveal that the insured was not in compliance with clearly unambiguous provisions of the policy, the supreme court has denied punitive damages.[29] Second, the court has denied an award

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[26] *Id.* at 800-02.

[27] The ambiguity arose in a conflict over construction of the liability provision, Part I, of the policy and the physical damage section, Part II, of the policy. It was unclear whether or not all of the insured's private passenger, farm, and utility automobiles had to be covered by Part II in order for the pickup truck to be covered under Part I. *Id.* at 799-802.

[28] Progressive Cas. Ins. Co. v. Keys, 317 So. 2d 396 (Miss. 1975). *See* note 14 *supra.*

[29] Cases included in this group are New Hampshire Ins. Co. v. Smith, 357 So. 2d 119 (Miss. 1978), Mutual Life Ins. Co. v. Douglas, 356 So. 2d 1145 (Miss. 1978), and Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321 (Miss. 1977).

In *Smith,* Mrs. Smith injured her back while helping in her neighbor's home. The neighbor's policy covering the premises included $500.00 in medical payments for injuries incurred by anyone on the premises and $25,000.00 in liability coverage. Mrs. Smith insisted on having her medical bills paid in full, even though the insurer had offered the maximum of $500.00 under the policy limits. In a subsequent action on the policy, the court found that Mrs. Smith had failed to submit a medical report, or furnish the insurer with an authorization to consult with her physician, and held that the insurer was correct in denying liability due to Mrs. Smith's noncompliance with policy provisions. 357 So. 2d at 120-21.

In *Douglas,* the insured's policy for life insurance was dated March 1, 1970, issued March 4, 1970, and delivered March 8, 1970. The main issue in the suit on the policy was whether the insured's death was accidental or a suicide. The supreme court determined from the evidence that the insured committed suicide on January 8, 1972, and held that the "plain provisions" of the suicide provision limited the proceeds to the beneficiary. 356 So. 2d at 1147-50. The provision read as follows: "SUICIDE—In the event of the suicide of the Insured, sane or insane, within 2 years after the date of issue, the amount payable by the Company shall be limited to the amount of the premiums paid." *Id.* at 1148, 1150.

In *Crews,* the insured had group health insurance through his employer. The insured's wife had incurred medical bills, and when submitted, the insurer refused to pay them. The policy called for proof of loss statements to be submitted within 90 days of the loss. After the first 90 days, the insurer gave the insured an additional 90 days but the insured failed to submit the hospital bill until 237 days after loss, and the doctor's of punitive damages where the provision in the policy was ambiguous or of an arguable construction, and the insurer's adjusters acted with a semblance of good faith.[30] Finally, where facts show that the policy provision was unambiguous and that the insurance company took action in clear contravention of the express terms, an award of punitive damages has been affirmed.[31]

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bills until 327 days after loss. 341 So. 2d at 1321-22. The supreme court, in reversing the award of punitive damages, noted that the insurer was justified in "relying upon the provision of the policy." *Id.* at 1322.

The insured owes certain duties to his insurer and must cloak himself in good faith. *See* Thornton & Blaut, *Bad Faith and Insurers: Compensatory and Punitive Damages*, 12 FORUM 699, 703 n.9 (1976-77) (duties include: "[n]otifying the insurer timely of the loss; timely providing proofs of loss; sufficiently giving details to the insurer; inspections of goods, property, persons, books of account, and inventories; timely periodic proofs of claim; reasonable protection of property from further loss, or deterioration; and the duty to cooperate").

[30] Aetna Cas. and Sur. Co. v. Steele, 373 So. 2d 797, 801 (Miss. 1979); Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387, 391 (Miss. 1978); *accord*, Michael v. National Security Fire & Cas. Co., 458 F. Supp. 128, 131-32 (N.D. Miss. 1978) (punitive damages not in order if insurance company has "arguable reason" for refusing to pay claim). For a discussion of *Steele*, see notes 23 through 26 and accompanying text *supra*.

In *Griffin*, the insured bought a truck and insured it with Bellefonte against collision, which included vandalism. The insured leased the truck to Eagle Motor Lines, and the truck later had sugar poured into the gas tank. Insured notified insurer on May 15, 1975, and met adjuster at repair shop where both requested it be repaired. On May 29, 1975, the truck was ready, but insured had refused Bellefonte's offer of $2,431.95 on the $4,796.74 repair bill, and repair shop retained possession. On June 24, 1975, Bellefonte wrote insured that offer of $2,431.95 was based on 49.3% depreciation on the repairs (parts and labor), and that the second offer of $2,878.05 was based on 40% depreciation of repairs (parts and labor). The insured contended that the truck had been overhauled at 36,248 miles before the vandalism, and that Bellefonte had failed to investigate this claim in computing its offer. Bellefonte made a final offer of $3,800.00 (based on depreciation of parts only), which the insured rejected. The repair shop foreclosed on the truck, sold it, and paid the bill. In an action on the policy, the main contention was over construction of a "deduction for depreciation" requirement under the limitation of liability provision of the policy. 358 So. 2d at 389. The court found that the provision was ambiguous and could be interepreted as allowing the insurer to double dip in replacing damaged parts with parts of like age and kind and to depreciate those same parts. The provision was also unclear whether or not the repair labor was depreciable. The court refused to allow punitive damages because Bellefonte's failure to investigate thoroughly Griffin's claim of a more recent overhaul of the truck was not gross negligence, and also, Bellefonte's offers of adjustment were "ongoing." *Id.* at 390-91.

[31] Travelers Indem. Co. v. Wetherbee, 368 So. 2d 829, 834-35 (Miss. 1979); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977).

For a discussion of *Wetherbee*, see notes 17 through 22 and accompanying text *supra*. In *Veal*, the insured entered a loan agreement with a finance company. Subsequently, the insured secured credit life insurance on this obligation. The language of the

Although the court may be balancing the interests of the insurer and the insured in these cases, this dilemma of what is, or is not, ambiguous has given the insurance company advantageous leverage in choosing the precise wording of its policy.[32] The court's holdings allow an insurer to cloud policy provisions with an eye toward the creation of ambiguities, to have its adjusters undertake a campaign of less than satisfactory offers under the policy, and then to rest reasonably well assured that its conduct will not be sufficiently reprehensible to warrant punitive damages should litigation result.[33]

II. UNINSURED MOTORIST COVERAGE

In Mississippi and the majority of jurisdictions,[34] statutes require that persons operating motor vehicles on state highways maintain financial responsibility for injuries resulting from their auto accidents.[35] Initially, because the uninsured defendant was not required to comply with the statutory requirements until after an accident,[36] the policy behind the statutory scheme was not being effectuated. Since numerous personal injuries were go-

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policy clearly defined "insured" to refer to both the principal debtor and his spouse. 354 So. 2d at 241. When his wife died, the insured, under the terms of the policy, submitted a claim with Standard, the insurer. Standard refused to pay the claim, taking the position that the name of the insured's deceased spouse was not on the note; consequently, no debtor-creditor relationship existed, and thus, there was no insurable interest. *Id.* at 242-43. In upholding the award of punitive damages, the supreme court found that Standard's refusal to honor the policy was for "a reason clearly contrary to the express provisions of its own policy." *Id.* at 248.

[32] It is recognized that in insurance contract construction, ambiguities are most strongly construed against the insurer. Peerless Ins. Co. v. St. Laurent, 247 Miss. 134, 141, 154 So. 2d 135, 138 (1963).

[33] *See* note 30 and accompanying text *supra.*

[34] Comment, *Stacking of Uninsured Motorist Coverage—An Exercise in Judicial Interpretation,* 5 CUM.-SAM. L. REV. 106, 106 (1974). *See generally* Notman, *A Decennial Study of the Uninsured Motorist Endorsement,* 43 NOTRE DAME LAW. 5, 5-6 (1967) (breakdown of states in the majority); Walsh, *Subrogation Under Uninsured Motorists Insurance,* 10 B.C. INDUS. & COM. L. REV. 77, 78 n.9 (1968) (listing 30 states requiring uninsured motorist coverage at least equal to amount of security required under state financial responsibility law).

[35] MISS. CODE ANN. §§ 63-15-1 to -75 (1972 & Supp. 1979).

[36] *Id.* § 63-15-11 (Supp. 1977). The statute imposed no sanctions for failure to secure liability coverage before a claim. *Id.*

ing unremedied,[37] the Mississippi Legislature required that uninsured motorist (UM) coverage be written into all automobile liability policies to compensate for the flaw in the financial responsibility laws.[38]

The theory behind UM coverage is to place the injured motorist in the same position he would have been in if the negligent uninsured motorist had carried at least the minimum amount of liability insurance required by statute.[39] Mechanically, the insurer adds an endorsement to the policy and requires payment of a separate premium.[40] When the insured is injured by a negligent uninsured motorist, he files a claim with the insurer for the amount of the judgment[41] he would have received had the defendant been insured.[42]

A. *Aggregation of Claims*

Aggregation of claims, or stacking, is a judicially created device designed to provide the insured with the difference between the minimum amount of UM coverage controlled by the state's financial responsibility laws[43] and the total amount of the judgment against the uninsured defendant.[44] Where the insured has coverage on more than one vehicle, stacking is either *inter*-policy, involving separate policies each with a UM endorsement, or *intra*-policy, involving one policy with separate endorsements and premiums for each vehicle.[45] In either context, the individual coverages are aggregated until the full amount of coverage is obtained or the total judgment is satisfied.[46]

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[37] *See* Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 Nw. U.L. Rev. 497, 497-98 (1967) (the problem of financial irresponsibility became serious after World War II).

[38] Miss. Code Ann. § 83-11-101 (Supp. 1979) provides in pertinent part:

> No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law. . . .

[39] Davis, *Uninsured Motorist Coverage: Some Significant Problems and Developments*, 42 Mo. L. Rev. 1, 2-3 (1977).

[40] Miss. Code Ann. § 83-11-101 (Supp. 1979). UM coverage is a substitute by the insurance industry for more comprehensive, desirable remedies. Davis, *supra* note 39, at 23.

[41] The Mississippi Supreme Court has construed § 83-11-101 to mean that the insured need not get a valid judgment against the uninsured motorist before going against the insurer, but must, at a minimum, establish the legal liability of the uninsured motorist. The insured may establish this liability in an action against the insurer. Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 460 (Miss. 1971).

[42] It must be emphasized that the standard UM provision does not provide coverage for the total amount of the judgment or claim the insured has against the uninsured defendant, but is restricted to certain basic limits generally within the bounds of the state's financial responsibility laws. A. Widiss, A Guide to Uninsured Motorist Coverage § 3.7, at 136-37 (1969).

The courts are generally mixed in their recognition and application of stacking.[47] Those jurisdictions and insurers that refuse to allow the practice base their position on the strict construction of "other insurance"[48] and "limits of liability" provisions.[49] Those courts favoring stacking have relied on the well established principle that such clauses be strictly construed against the insurer,[60] or have declared that such clauses are in conflict with statutorily mandated UM coverage,[61] or have used unconscionability to strike such clauses in the context of coverage limited to one endorsement but with a separate premium paid for each policy.[62]

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[43] *Id.*

[44] Note, *Stacked Recovery Under the Uninsured Motorist Endorsement of the Automobile Liability Policy,* 9 VAL. U.L. REV. 135, 137-38 (1975).

[45] *Id.* at 138-39.

[46] *See* Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 537-39 (Miss. 1975) (explaining concept of "stacking" coverages in area of uninsured motorist provisions of liability policy).

[47] One writer has contended that those jurisdictions that allow stacking are part of the "recent majority." Comment, *The Invalidity of the "Other Insurance" Provision: A New Majority,* 17 S.D.L. REV. 152, 152 (1972).

[48] *See, e.g.,* McCarthy v. Preferred Risk Mut. Ins. Co., 454 F.2d 393, 395 (9th Cir. 1972) (where "other insurance" clauses in two separate policies for $10,000.00 each resulted in each policy paying only $5,000.00, such result comported with statutory minimum requirements, and thus, clauses were valid); Harris v. Southern Farm Bureau Cas. Ins. Co., 247 Ark. 961, 448 S.W.2d 652, 654 (1970) (parties contracted with reference to express terms, including "other insurance" clause, and to permit stacking would fly in the face of such express terms); Glidden v. Farmers Auto. Ins. Ass'n, 11 Ill. App. 3d 81, 296 N.E.2d 84, 86 (1973) ("other insurance" provisions do not hinder legislative purpose of providing protection against uninsured motorists); State Farm Mut. Auto. Ins. Co. v. United Servs. Auto. Ass'n, 211 Va. 133, 176 S.E.2d 327, 330 (1970) ("pro rata" clause as part of "other insurance" provision for UM coverage of automobile policies held to be valid). For a more extensive treatment of conflicting "other insurance" clauses, see Comment, *Uninsured Motorist Endorsement—Some Problems of Construction,* 42 TUL. L. REV. 352, 371-74 (1968).

[49] *See, e.g.,* American Fidelity Fire Ins. Co. v. Williams, 80 Mich. App. 125, 263 N.W.2d 311, 313-14 (1977) (no statute or case law prohibits automobile insurer from limitation of recovery under UM coverage to policy limit less certain other statutorily mandated coverage); Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 701-02 (Miss. 1974) (clearly unambiguous limitation of liability provision is effective in limiting coverage to amount of policy); Automobile Club Inter-Ins. Exch. v. Diebold, 511 S.W.2d 135, 137-38 (Mo. App. 1974) (UM clause limiting insurer's liability to statutory minimum not against public policy).

It is manifest that the jurisdictions differ widely in their treatment of stacking.[63] In Mississippi, the supreme court has sailed a seemingly rudderless course in its decisions on the aggregation of claims. In 1971, in *Harthcock v. State Farm Mutual Automobile Insurance Co.*,[64] the court initially allowed an insured to aggregate his UM coverage, even though the policy contained an "other insurance" provision.[65] The court determined that the clause could not prohibit the insured from stacking the UM coverage from all available policies until the amount of the

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[60] *See, e.g.,* Employers Liab. Assurance Corp. v. Jackson, 289 Ala. 673, 270 So. 2d 806, 809-10 (1972) (affirmed trial court's finding that limitation of liability clause was ambiguous and hard to comprehend); Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 457 P.2d 34, 41 (1969) (insured's expectations of coverage should not be denied because of "unclear and obscure clauses" in policy); United Servs. Auto. Ass'n v. Dokter, 478 P.2d 583, 584-85 (Nev. 1970) (where insured would not anticipate that construction of "other insurance" clause of one of his two policies with insurer would limit recovery to only one policy, clause was ambiguous and should be construed against insurer).

[61] *See, e.g.,* Fidelity & Cas. Co. v. Darrow, 161 Conn. 169, 286 A.2d 288, 290-91 (1971) (policy provisions conflicting with UM statute cannot lower insured's recovery to an amount under that needed to indemnify insured for loss within limits of all policies involved); Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689, 691-92 (Fla. 1966) (statute requiring automobile liability policies to include UM coverage overrides "other insurance" clauses); Walton v. State Farm Mut. Auto. Ins. Co., 518 P.2d 1399, 1401 nn.2 & 4 (Hawaii 1974) (listing a total of 27 states with holdings similar to *Darrow* and *Sellers*).

[62] *See, e.g.,* Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 538 (Miss. 1975) ("[I]f the question must be resolved on the basis of who gets a windfall, it seems more just that the insured who has paid a premium should get all he paid for rather than that the insurer should escape liability for that for which it collected a premium.") (citing Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 207 N.W.2d 348, 352 (1973)). *See also* A. WIDISS, *supra* note 42, § 2.60, at 112 ("A premium has been paid for each of the endorsements and coverage has been issued. It seems both equitable and desirable to permit recovery under more than the endorsement until the claimant is fully indemnified.").

[63] *See* notes 47 through 52 *supra*.

[64] 248 So. 2d 456 (Miss. 1971).

[65] *Id.* at 461-62.

"insured motorists" liability had been reached.[56] In the subsequent case of *Talbot v. State Farm Mutual Automobile Insurance Co.,*[57] the court held that if the "limits of liability" clause was clear and unambiguous, then aggregation of UM coverage would not be permitted.[58] However, in succeeding years, the reliability of *Talbot* was cast into doubt when the court changed directions in the cases of *Southern Farm Bureau Casualty Insurance Co. v. Roberts*[59] and *State Farm Mutual Automobile Insurance Co. v. Bishop.*[60] In both *Roberts* and *Bishop,* the policies contained clear and unambiguous "limits of liability" provisions. Notwithstanding the precedent of *Talbot,*[61] the supreme court allowed the insured in each case to stack the UM coverage and appeared to rely primarily on the unconscionable result of allowing an insurer to reap the benefits of multiple premiums while holding the insured to single coverage.[62] In 1977, the court decided *Hartford Accident & Indemnity Co. v. Bridges*[63] and attempted to clarify some of the confusion created by the previous cases, discussing both the ambiguity of the "limits of liability" clause and the separate payment of premiums. The court noted that where separate premiums were paid for each endorsement of UM coverage,[64] a presumption arose that "the coverage in the one policy is the same as would be furnished if such coverage was provided for in separate policies covering the same vehicles."[65] More importantly, where the "limits of liability" clauses were ambiguous[66] so as to be construed against the insurer, then the insured would be permitted to aggregate his claims.[67]

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[56] *Id.*

[57] 291 So. 2d 699 (Miss. 1974).

[58] *Id.* at 702. The court implied that if the limiting clause were determined to be ambiguous, then stacking would be allowed. However, the court did not expressly comment on the ramifications of such an ambiguous limiting clause.

[59] 323 So. 2d 536 (Miss. 1975).

[60] 329 So. 2d 670 (Miss. 1976).

[61] *See* notes 57, 58 and accompanying text *supra.*

[62] State Farm Mut. Auto. Ins. Co. v. Bishop, 329 So. 2d 670, 672-73 (Miss. 1976) (stacking allowed where two policies issued by one insurer); Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 537-38 (Miss. 1975) (a separate premium was paid for each of three policies issued by single insurer; stacking should be allowed). For other authority relying on the theory of unconscionability to allow stacking, see note 52 *supra.*

[63] 350 So. 2d 1379 (Miss. 1977). *Bridges* presented the familiar scenario of an insured's having one policy and paying separate premiums on three automobiles, each of which had a separate UM endorsement. *Id.* at 1380.

[64] *See* notes 57, 58 and accompanying text *supra.*

[65] 350 So. 2d at 1381.

Last term, the court addressed the subject of stacking in *Pearthree v. Hartford Accident & Indemnity Co.*[68] Pearthree brought suit against both Hartford and United States Fidelity & Guaranty Company when the companies refused to pay on policies issued by them to Pearthree's mother, who was killed as a result of the negligence of an uninsured motorist.[69] The Chancery Court of Lauderdale County held for the insurance companies, citing, *inter alia,*[70] the fact that Pearthree could not aggregate the UM coverage under the policies.[71] The supreme court, relying on *Bridges,*[72] reversed the chancery court and held that while the charging of separate premiums was a contributing element in allowing aggregation,[73] the determinative factor was the construction of the limiting provision as ambiguous.[74] While *Bridges* was noteworthy in the court's reconciliation of prior conflicting lines of authority,[75] the court in *Pearthree* is to be commended for its refining even further the stability created by *Bridges*. In *Bridges,* the court gave greater weight to the factor of payment of separate premiums."[76] *Pearthree* makes it abundantly clear[77] that the answer to the question of whether or not stacking will be allowed is found in the further, more crucial, question of whether or not the limiting provision of the policy is ambiguous.[78]

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[66] *See* notes 59 through 62 and accompanying text *supra.*

[67] 350 So. 2d at 1380-82. Contrary to what one might conclude, the court did not overrule *Talbot,* but distinguished it on its facts. *Id.* at 1381. It is extremely difficult to attribute vitality to *Talbot,* as the court apparently is inclined to do, and at the same time reconcile it with *Roberts* and *Bishop.*

[68] 373 So. 2d 267 (Miss. 1979).

[69] *Id.* at 268-69.

[70] The chancery court also held that Pearthree was not an "insured" under the respective policies, and that she was estopped from bringing suit because of failure to give timely notice of her claims to the insureds. *Id.* at 269.

[71] *Id.*

[72] The court noted that the "limits of liability" provision in the United States Fidelity & Guaranty Company and Hartford policies was materially identical with the one in *Bridges. Id.*

[73] It was established that United States Fidelity & Guaranty charged separate premiums, but unclear whether or not Hartford had done so. Notwithstanding, the court said ". . . but, as we have said, the charging of separate premiums is not decisive." 373 So. 2d at 270.

[74] The court so commented twice:

> We are of the opinion that a construction permitting aggregation flows from the ambiguity of the limiting clauses in the policies covering more than one automobile, not from the charging of separate premiums. . . . In our opinion the construction employed in *Bridges* applies to both the Hartford and USF&G policies, inasmuch as we determine the charging of separate premiums to be without decisional significance in the face of multiple automobile coverages under ambiguous limitation clauses.

Id. at 270-71.

B. Legislation

In 1979, the Mississippi Legislature amended section 83-11-103 of the Mississippi Code to have the definition of "uninsured motor vehicle" include "an insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage."[79] In short, this change makes an underinsured vehicle tantamount to an uninsured one. Among the states, some have made this definitional change through the courts,[80] while others, like Mississippi, have adopted legislation so providing.[81] Prior to this amendment, an insured plaintiff could not recover under his UM coverage if the tortfeasor had any liability insurance available because the tortfeasor would not be technically "uninsured." Consequently, on many occasions plaintiffs were actually in a better position where the tortfeasor had no insurance, than where he had the bare statutory minimum.[82]

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[75] *See* notes 57 through 62 and accompanying text *supra.*

[76] *See* text accompanying note 65 *supra.*

[77] *See* note 74 *supra.*

[78] *Pearthree* may be viewed as a fulfillment of the implication created by the holding in *Talbot. See* note 58 *supra.* The court's heavy reliance on the question of ambiguity should signal a move away from *Roberts* and *Bishop* as reliable precedent, but the court nevertheless is content that they are factually distinguishable from *Talbot,* and presumably *Pearthree. See* Peathree v. Hartford Accident & Indem. Co., 373 So. 2d at 270 (court distinguishes *Talbot* as involving one insurance policy with one uninsured motorist endorsement).

[79] H.R. 88, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 429, 1979 Miss. Laws, *codified at* Miss. Code Ann. § 83-11-103 (Supp. 1979).

[80] *See, e.g.,* Taylor v. Preferred Risk Mut. Ins. Co., 225 Cal. App. 2d 80, 37 Cal. Rptr. 63, 64 (1964) (in conflict between two provisions of UM statute, provision defining uninsured motor vehicle would be construed to include any vehicle carrying less than financial responsibility requirements of vehicle code); Carrignan v. Allstate Ins. Co., 108 N.H. 131, 229 A.2d 179, 180-81 (1967) (motorist involved in accident with insured was covered by liability insurance in amount equal to one-half of that required in jurisdiction where accident occurred, and was held to be uninsured); Cruzado v. Underwood, 39 Misc. 2d 859, 242 N.Y.S.2d 74, 75 (1963) (vehicle insured for $5,000.00 and $10,000.00, rather than for $10,000.00 and $20,000.00 required by statutes, was held to be uninsured).

[81] Of the states now having legislation regarding UM coverage, 10 have adopted pro-

Last year the legislature also amended section 83-11-101 of the Mississippi Code to require that property damage provisions be included in UM policies.[83] Before this change, most people with the standard automobile insurance policy probably assumed that their UM coverages did indeed include such property damage losses.[84] Notably, Mississippi has joined a growing number of other states in extending statutory UM coverage.[85]

III. EXTENT OF INSURER'S RIGHT OF SUBROGATION AGAINST THIRD PARTY TORTFEASOR FOR WORKMEN'S COMPENSATION PAYMENTS TO INSURED: A CONFLICT OF PRINCIPLES

Liability insurance policies routinely provide subrogation clauses,[86] and the validity of such clauses is undisputed.[87] Questions of recovery flowing from a third party tortfeasor's liability to an employee/insured in the context of workmen's compensa-

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visions expressly defining as an "uninsured vehicle" one not having bodily injury insurance or sufficient bond to satisfy state financial responsibility law at the time of the accident. *See* Widiss, *supra* note 37, at 513 n. 61.

[82] Davis, *supra* note 39, at 10-11.

[83] H.R. 415, 1979 Miss. Leg., Reg. Sess., *enacted as* Chapter 432, 1979 Miss. Laws, *codified at* MISS. CODE ANN. § 83-11-101 (Supp. 1979).

[84] Davis, *supra* note 39, at 3.

[85] The states include Georgia, New Mexico, North Carolina, South Carolina, Virginia, and West Virginia. Cox, *Uninsured Motorist Coverage,* 34 MO. L. REV. 1, 38 (1969).

[86] There are two types of subrogation: conventional and legal. For example, if *X* drives his car negligently and damages *Y*'s car, *Y*'s carrier has subrogation rights against *X* or *X*'s carrier for property damage. *Y*'s carrier has a right based on equity and justice, and conferred by the law itself (legal subrogation). However, it is held generally that *Y*'s carrier does not have subrogation rights against *X* or *X*'s carrier for *Y*'s personal injuries or health costs, in absence of an express contractual provision (contractual subrogation). Procaccia, *The Effect and Validity of Subrogation Clauses in Insurance Policies,* 1973 INS. L.J. 573, 573-75.

[87] R. KEETON, BASIC TEXT ON INSURANCE LAW 148, 148 n.5 (1971).

tion insurance are statutorily controlled.[88] In recognition of the inequity of permitting the injured employee to obtain a recovery from both the third party tortfeasor and the nonnegligent employer, state legislatures have devised various statutory schemes which permit "the compensation-paying employer to obtain, in effect, reimbursement for his compensation outlay from the third party tortfeasor."[89] Section 71-3-71[90] provides, in pertinent part:

> The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee shall not affect the right of the employee or his dependents to sue any other party at law for such injury or death, but the employer or his insurer shall be entitled to reasonable notice and opportunity to join in any such action or may intervene therein. If such employer or insurer join in such action, they shall be entitled to repayment of the amount paid by them as compensation and medical expenses from the *net proceeds* of such action. . . .
>
> The commencement of an action by an employee or his dependents . . . against a third party for *damages* by reason of the injury . . . shall not affect the right of the injured employee or his dependents . . . to recover compensation, but *any amount* recovered by the injured employee or his dependents . . . from a third party shall be applied as follows: reasonable costs of collection . . . shall be deducted; the remainder, or so much thereof as is necessary, shall be used to discharge the legal liability of the employer or insurer; and any excess shall belong to the injured employee or his dependents. (emphasis added).

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[88] *See* 26 Ark. L. Rev. 588, 589 n.4 (1973) (exhaustive list of states' treatment of third party tortfeasors in context of subrogation by carrier or employer for workmen's compensation payments to insured/employee).

[89] *Id.* at 589.

[90] Miss. Code Ann. § 71-3-71 (1972). One writer has classified third party workmen's compensation statutes into various categories. Mississippi's statute appears to fall into that group called subrogation statutes, providing for employer, or carrier, subrogation to the rights of the employee against the third party, and which leave the courts to interpret the statute as they wish. 48 Geo. L.J. 761, 761-75 (1960) (listing and discussion of five other categories in American jurisdictions).

Last term, in *Mississippi Power Co. v. Jones,*[91] the Mississippi Supreme Court decided a case of first impression in this jurisdiction.[92] The injured employee recovered compensatory and punitive damages due to his employer's negligence.[93] State Farm Insurance Company was the injured employee's carrier for payment of workmen's compensation, and the issue on cross-appeal was whether State Farm was limited under its statutory subrogation rights to the amount recovered in actual damages, or permitted to seek reimbursement out of the punitive damages as well.[94] The *Jones* court was of the opinion that the statutory entitlement to share in "net proceeds" and "any amount recovered" was clear and unambiguous, and under a theory of plain and literal interpretation, held that State Farm was entitled to share in the award of punitive damages in repayment of its compensation to the insured.[95]

In a two-fisted dissent,[96] Justice Bowling initially chided the 1948 Mississippi Legislature for being goaded into the passage of section 71-3-71, and then vociferously attacked the majority's interpretation of the statute.[97] Justice Bowling contended that the court should have recognized the undisputed principle that punitive damages were not truly "damages," but, rather, were "in the nature of punishment for a wrong done," and, consequently, could not be considered as included in the term "damages" in the statute.[98] Justice Lee also dissented, pointing out that "compensation and medical expenses paid" referred to compensatory damages and not punitive damages and that the words "net proceeds of such action" referred to the action for injury or death, which encompassed only actual damages.[99]

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[91] 369 So. 2d 1381 (1979) (en banc).

[92] The court noted that it had never considered the issue, and that no cases from other jurisdictions had been cited by the parties. *Id.* at 1387.

[93] The Circuit Court of Lauderdale County awarded $5,000.00 in actual damages and $15,000.00 in punitive damages. *Id.* at 1382.

[94] *Id.* at 1387.

[95] *Id.* The court relied on Litton Syss., Inc. v. Murphree, 301 So. 2d 850 (Miss. 1974), in its construction of MISS. CODE ANN. § 71-3-71 (1972). *Litton* was a wrongful death action by the heirs of the deceased employee. The court therein allowed a claim for funeral expenses to be considered "net proceeds" under the statute and emphasized that the statute means "exactly what it says." In *Jones,* the court said it was pursuing the "analogy of *Litton*" in construing " 'net proceeds' in the statute as all inclusive." The court went on to say that "it logically follows that punitive damages would also be recoverable under the same statute." 369 So. 2d at 1388.

[96] 369 So. 2d at 1389-90 (Bowling, J., dissenting). Justice Bowling was joined in dissent by Chief Justice Patterson.

[97] *Id.* at 1389 (Bowling, J., dissenting). Justice Bowling also noted that MISS. CODE ANN. § 71-3-71 (1972) allowed the carrier "a free ride in collecting what it had received premiums to pay."

In *Jones,* the court encountered a number of conflicting principles. Mississippi law has established that punitive damages "are not awarded to compensate a party for an injury, but are granted in the nature of punishment for the wrongdoing of the defendant as an example so that others may be deterred from the commission of similar offenses, thereby, in theory, protecting the public."[100] Also present was a basic philosophy behind the workmen's compensation scheme that the carrier should be subrogated to the rights of the insured/employee against the third party tortfeasor.[101] Finally, there was the principle of law that where "the language used by the legislature in a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion to resort to rules of statutory interpretation."[102] The court paid lip service to the rule that punitive damages were not actually damages[103] and used a theory of plain and literal language[104] to make what can be viewed as a logical extension of the axiom that an insurer is entitled to reimbursement through subrogation to the rights of the employee/insured.[105] The Mississippi Supreme Court's extension may be logical, but it is certainly not equitable. While it may be argued that allowing greater subrogation recoveries to workmen's compensation carriers by extending their subrogation rights to punitive damages will decrease the overall cost of insurance through lower premiums,[106] the individual employee is certainly not the better off for the present with such a statutory interpretation.[107] It is submitted that Justice Bowling's interpretation[108] of the statute was a reading equally plain and literal as that of the majority's,[109] but with a result more attuned to equity than to symmetry.

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[98] 369 So. 2d at 1389. In addition, Justice Bowling found *Litton* to be inapposite. He contended that the funeral expenses in *Litton* clearly were damages as contemplated by the statute, and thus different from the punitive damages (not considered true damages) in *Jones. Id.* Justice Bowling also emphasized that trial courts require juries to bring back one verdict for compensatory damages and a separate verdict for punitive damages, "which by no stretch of the imagination could be called 'damages' to the injured employee." *Id.* at 1390. Finally, Justice Bowling concluded: "With all respect, I cannot see any justification, legally or otherwise, for permitting the compensation carrier to be subrogated to funds received by the injured employee . . . that have nothing whatsoever to do with the payments . . . under its contractual obligation executed for specific premiums under specific coverages." *Id.*

[99] 369 So. 2d at 1390-91 (Lee, J., dissenting).

[100] *Id.* at 1387.

[101] *See* notes 88 through 90 and accompanying text *supra.*

[102] 369 So. 2d at 1388.

[103] *Id.* at 1387.

[104] *Id.* at 1388.

[105] *See* notes 88 through 90 and accompanying text *supra.*

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[106] *See* Lasky, *Subrogation Under the California Workmen's Compensation Laws—Rules, Remedies and Side Effects*, 12 SANTA CLARA L. REV. 1, 5-6 (1972) (greater recoveries by workmen's compensation carrier will be balanced by decreased premium rates in years following recovery).

[107] As Justice Bowling noted: "The punitive damage award is solely in the nature of punishment for a wrong done and it just so happens that the money for that punishment does not go to the state, a church, an orphanage, or any other charitable entity, but is paid to the other party in the controversy." 369 So. 2d at 1389 (Bowling, J., dissenting).

[108] *See* notes 96 through 98 and accompanying text *supra*.

[109] *See* notes 91 through 95 and accompanying text *supra*.

MISCELLANEOUS

During the 1979 term the Supreme Court of Mississippi rendered decisions on various topics including contracts, domestic relations, municipalities, taxation, and wills and estates, which will be treated below in the alphabetical order indicated in this section. Some of these cases demand rather extensive commentary and analysis while others, having little precedential importance, are discussed only briefly. It is hoped that the following comments will have both academic and practical value.

I. CONTRACTS

Ten cases involving contracts reached the supreme court in 1979. Three of these cases will be discussed textually under the Statute of Frauds and Parol Evidence subheadings which follow. The seven remaining contract cases are deemed of minor significance and will be treated only by notations. These less significant cases concern termination by death,[1] installment contracts for the sale of land,[2] ambiguous contracts,[3] restrictive covenants[4] and other areas.[5]

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[1] In Thomas Yates & Co. v. American Legion, 370 So. 2d 700, 702 (Miss. 1979), the supreme court affirmed the trial court's holding that a contract for personal services terminates on the death of the party rendering the services. In Marcoin, Inc. v. Hammond, 368 So. 2d 1257, 1258-59 (Miss. 1979), the court held that where it is clear, express and unambiguous, a termination by death clause in a personal service contract is enforceable under the principles of freedom of contract and is not violative of public policy unless the facts demand the intervention of equity or the application of the principle of recoupment.

[2] In Stabiler v. Webb, 375 So. 2d 980, 984-85 (Miss. 1979), the court concluded that where an installment land contract was determined to be terminated but the purchaser retained possession, the seller was entitled to keep all past installments paid according to the terms of the parties' agreement, and was entitled to fair rental, not past due installments, for the wrongful detention of the property.

[3] In Cameron v. Chuck Ryan Cars, 374 So. 2d 1305, 1307 (Miss. 1979), the court held that ambiguities in a written contract will be construed most strongly against the drafting party. *See* note 49 and accompanying text *infra.*

[4] In Cheatham v. Kem Mfg. Corp., 372 So. 2d 1085, 1088-89 (Miss. 1979), the court held that covenants not to compete in a certain geographical area for two years following termination of an employee's contract were enforceable by way of injunction upon a proper evidentiary showing of the employee's violation of the covenant.

A. Statute of Frauds

Four contract cases decided by the supreme court in 1979 involved the statute of frauds.[6] Two of these cases will be treated parenthetically,[7] but the other two merit textual commentary. In *Anderson Construction Co. v. Lyon Metal Products, Inc.*,[8] and *Sanders v. Dantzler*,[9] the court reached opposite results on the question of whether the defensive assertion of the statute of frauds[10] may be successfully defeated by the affirmative assertion of promissory estoppel[11] in oral sales contracts.

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[5] *See* O.J. Stanton & Co. v. Mississippi State Highway Comm'n, 370 So. 2d 909, 915 (Miss. 1979) (ambiguities in contracts may be explained by custom and usage, but custom and usage may not prevail over a contract's express provisions); Gibbons v. Associated Distribs., Inc., 370 So. 2d 925, 927 (Miss. 1979) (an oral agreement within the statute of frauds may be removed therefrom either by a new agreement which is to be performed within the statutory period or by complete performance of the agreement by the charging party); notes 7 and 47 *infra*.

[6] Sanders v. Dantzler, 375 So. 2d 774 (Miss. 1979); C.E. Frazier Constr. Co. v. Campbell Roofing & Metal Works, Inc., 373 So. 2d 1036 (Miss. 1979); Anderson Constr. Co. v. Lyon Metal Prods., Inc., 370 So. 2d 935 (Miss. 1979); Gibbons v. Associated Distribs., Inc., 370 So. 2d 925 (Miss. 1979).

[7] C.E. Frazier Constr. Co. v. Campbell Roofing & Metal Works, Inc., 373 So. 2d 1036, 1038-39 (Miss. 1979) (when the bill alleges a promise on which the plaintiff justifiably relies and acts to his detriment, a case in equity is sufficiently averred on the grounds of promissory estoppel notwithstanding the statute of frauds); Gibbons v. Associated Distribs., Inc., 370 So. 2d 925, 927 (Miss. 1979) (an oral agreement within the statute of frauds may be taken out of that statute by execution of a new agreement which is to be performed within the statutory period, or by the complete performance of the agreement by the charging party).

[8] 370 So. 2d 935 (Miss. 1979).

[9] 375 So. 2d 774 (Miss. 1979).

[10] The statute of frauds provision involved in *Anderson Construction* and *Sanders* is found in the Uniform Commercial Code provisions of the Mississippi Code. The appropriate section, in part, is as follows:

> Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . .

MISS. CODE ANN. § 75-2-201 (1972).

[11] The doctrine of promissory estoppel has emerged as a method of enforcing parol contracts. Promissory estoppel is the term widely recognized as descriptive of the equitable principle embodied in the RESTATEMENT OF CONTRACTS § 90 (1932) which is as follows: "A promise which the promisor should reasonably expect to induce action or for-

Because the court distinguished these two cases solely on their factual differences,[12] a summary of each is warranted. In *Anderson Construction,*[13] Lyon refused to honor his submitted bid to Anderson because of a material difference between the figures relied on in determining the bid price and the actual figures required.[14] Lyon asserted the statute of frauds as a defense because there was no writing signed by Anderson, and the chancery court dismissed Anderson's bill.[15] Anderson appealed, urging that Lyon be precluded from defensively asserting the statute of frauds because of the doctrine of promissory estoppel.[16] The supreme court refused to allow the nonstatutory doctrine to defeat the statute of frauds and affirmed the trial court's action.[17] In *Sanders,*[18] Dantzler refused to honor his offer to buy

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bearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." This provision of the *Restatement* was adopted in Mississippi in Lusk-Harbison-Jones, Inc. v. Universal Credit Co., 164 Miss. 693, 698, 145 So. 623, 624 (1933), in which a lender who had title to automobiles in borrower's possession, and who justifiably relied on the borrower's oral promise to secure insurance on the encumbered property, recovered from the borrower for the uninsured injury to the property without losing the underlying indebtedness. The RESTATEMENT (SECOND) OF CONTRACTS § 90 (1973) revised the first section somewhat by eliminating the necessity of induced action or forbearance of a "definite and substantial character on the part of the promisee" and by restricting the remedies available to the promisee. For a background discussion of the doctrine of promissory estoppel, see generally G. GILMORE, THE DEATH OF CONTRACT 59, 59-74 (1974); Boyer, *Promissory Estoppel: Principle From Precedents: I,* 50 MICH. L. REV. 639, 639-74 (1952); Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine,* 98 U. PA. L. REV. 459, 459-98 (1950).

[12] "The case at bar is clearly distinguishable on its facts from *Thomas v. Prewitt* and *Anderson Construction Co., Inc., v. Lyon Metal Products, Inc.* where we declined to apply the doctrine of promissory estoppel." 375 So. 2d at 777 (citations omitted).

[13] 370 So. 2d 935 (Miss. 1979).

[14] *Id.* at 935-36. Lyon prepared a bid for the cost of supplying and installing 306 metal lockers while Anderson in fact had required 496 lockers. Lyon's bid was for $6,967.52 and the other bids received were $11,727.00 and $11,464.00. Lyon's revised bid for $11,247.28 was rejected by Anderson. Anderson then purchased and installed the lockers at its own expense and sued for the difference between its cost, $14,510.00, and Lyon's original bid. *Id.* at 936.

[15] *Id.* Lyon had confirmed in writing his bid to Anderson for 306 lockers, but Anderson neither responded to nor denied that confirmation. *Id.* at 937.

[16] *Id.* at 936. *See* notes 10 and 11 *supra.*

[17] 370 So. 2d at 937. The court incorporated into its opinion the reasoning found in Thomas v. Prewitt, 355 So. 2d 657 (Miss. 1978), which also refused to allow promissory estoppel to diminish the effect of the statute of frauds. The *Thomas* court rationalized its refusal by quoting the opinion in Tanner v. Walsh, 184 Miss. 147, 158, 183 So. 278,

Sanders' service station, claiming no mutual assent.[19] Dantzler asserted the statute of frauds as a defense because there was no writing evidencing the agreement, and the circuit court denied Sanders recovery.[20] On appeal, Sanders maintained that under the doctrine of promissory estoppel, Dantzler should be foreclosed from utilizing the statute of frauds as a defense.[21] The supreme court agreed with Sanders' assignment of error and held that Dantzler was estopped from avoiding his promise via the statute of frauds.[22] Thus, in two similar cases the doctrine of promissory estoppel was asserted by both plaintiffs, but only one plaintiff was successful in negating the prohibition of the statute of frauds.

The cases relied on by the court in *Sanders*[23] do not clearly indicate when promissory estoppel will override the requirements of the statute of frauds.[24] The long line of cases which has

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279 (1938), which stated: "To hold otherwise would destroy the purpose of the statute to prevent frauds and perjuries."

[18] 375 So. 2d 774 (Miss. 1979).

[19] *Id.* at 775. Negotiations between the parties for the sale of the service station resulted in Dantzler's promise to pay $11,000.00 for the equipment and good will in the business. Sanders was required to cancel his lease agreement with Chevron Oil Company in order for Dantzler to qualify for a lease. Sanders terminated his lease with Chevron and demanded payment from Dantzler who refused to pay. Because Sanders had cancelled his lease agreement, Chevron refused to deliver any gasoline or accessories, and Sanders was forced to close his service station. *Id.*

[20] *Id.* at 774. *See* note 10 *supra.* In this case, the oral agreement between Sanders and Dantzler was witnessed by one of Sanders' employees who testified that the $11,000.00 purchase price figure was mutually agreed upon by the parties. 375 So. 2d at 777.

[21] 375 So. 2d at 775-76.

[22] *Id.* at 777. The *Sanders* court distinguished Thomas v. Prewitt, 355 So. 2d 657 (Miss. 1978), and Anderson Constr. Co. v. Lyon Metal Prods., Inc., 370 So. 2d 925 (Miss. 1979), on the facts. 375 So. 2d at 777. To support its decision, the court cited Martin v. Franklin, 245 So. 2d 602 (Miss. 1971), Martin v. Dixie Planing Mill, 199 Miss. 455, 24 So. 2d 332 (1946), and Brewer v. Universal Credit Co., 191 Miss. 183, 192 So. 902 (1940). For general support of its estopping the defensive assertion of the statute of frauds, the court quoted 73 AM. JUR. 2d *Statute of Frauds* § 565 (1974), which indicates that the equitable doctrine of estoppel may be used to circumvent the statute of frauds when necessary to prevent fraudulent schemes. 375 So. 2d at 776.

[23] *See* note 22 *supra.*

[24] In Martin v. Franklin, 245 So. 2d 602, 604 (Miss. 1971), a land owner was estopped from denying an oral land swap in order to gain possession of the other's newly constructed house on the land which was the subject of the oral agreement relied upon. In Martin v. Dixie Planing Mill, 199 Miss. 455, 463-64, 24 So. 2d 332, 334 (1946), the

held the writing requirement of the statute of frauds inviolate[25] has now ended, or, at least, has been disrupted by *Sanders.*[26]

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court estopped a land owner from denying the effect of a six-month extension option to cut timber granted to another by one whose option to remove the timber, originally granted by the land owner, was about to expire. In Brewer v. Universal Credit Co., 191 Miss. 183, 190-91, 192 So. 902, 904 (1940), the court applied the estoppel doctrine for the sole purpose of finding consideration in an oral agreement between a secured creditor and a debtor for extension of time for payment of past due installments. It should be noted that both *Dixie Planing Mill* and *Brewer* were decided prior to Mississippi's adoption of the statute of frauds provision in question in *Sanders.* That is, MISS. CODE ANN. § 75-2-201 (1972), the UCC statute of frauds, was adopted with the remainder of the UCC on March 31, 1968. Also, since neither *Franklin* nor *Dixie Planing Mill* involved contracts for the sale of goods, § 75-2-201 was inapplicable; instead, in both of the above cases the agreements involved real property rights which are governed by the general statute of frauds found at MISS. CODE ANN. § 15-3-1 (1972). The only other Mississippi cases that relate even remotely to proper application of estoppel are also pre-UCC cases. *See* Planters Lumber Co. v. Trinity Universal Ins. Co., 191 Miss. 875, 883, 4 So. 2d 300, 301 (1941) (quoting RESTATEMENT OF CONTRACTS § 90 (1932) and holding no liability because of reliance on false statements of other party); Lusk-Harbison-Jones, Inc. v. Universal Credit Co., 164 Miss, 593, 698-99, 145 So. 623, 624 (1933) (relying on RESTATEMENT OF CONTRACTS § 90 (1932) to estop one from denying his obligation to carry insurance for another's benefit as orally agreed).

[25] *See, e.g.,* Thomas v. Prewitt, 355 So. 2d 657, 661 (Miss. 1978) (UCC securities statute of frauds [MISS. CODE ANN. § 75-8-319 (1972)] like other statutes of fraud, must not be violated by nonstatutory exceptions. "Non-statutory exceptions to the writing requirement of statutes of fraud are not looked upon with favor in this state."); Tanner v. Walsh, 184 Miss. 147, 157, 183 So. 278, 279 (1938) (the court refused to "engraft exceptions on the statute [of frauds]"); Howie v. Swaggard, 142 Miss. 409, 415, 107 So. 556, 557 (1926) (part performance is not an exception that will be engrafted on the statute); Fisher v. Kuhn, 54 Miss. 480, 483 (1877) (the court will not accept part performance or anything else to take a case out of the statute); Box v. Stanford, 21 Miss. (13 S. & M.) 93, 95 (1849) (same); Beaman v. Buck, 17 Miss. (9 S. & M.) 207, 210 (1848) (same). *Contra,* Delta Lumber Co. v. Wall, 119 Miss. 350, 356-57, 80 So. 782, 784 (1919) (whether oral agreement to pay for lumber existed was question of fact; if defendants had agreed to pay, lien was established notwithstanding noncompliance with writing requirement of the statute of frauds).

[26] Other Mississippi cases that announce a doctrine of estoppel but do not deal specifically with MISS. CODE ANN. § 75-2-201 (1972), the UCC statute of frauds, are the following: Kelso v. Robinson, 172 Miss. 828, 840-41, 161 So. 135, 137 (1935) (applied estoppel doctrine to prevent silent claimant from defeating land title); Eagle Lumber & Supply Co. v. DeWeese, 163 Miss. 602, 622-23, 135 So. 490, 494 (1931) (estoppel doctrine not applied where parties were not entitled to rely on acts of another); Delta Lumber Co. v. Wall, 119 Miss. 350, 356-57, 80 So. 782, 784 (1919) (applied estoppel doctrine to enforce oral promise); Staton v. Bryant, 55 Miss. 261, 272 (1877) (estoppel principle will not be applied against silent landowner); Tobin v. Thomas H. Allen & Co., 53 Miss. 563, 567 (1876) (applied equitable estoppel to particular facts in reliance on the ancient maxim "that a man shall not be permitted to take advantage of his own wrong"); Cocke v. Kuykendall, 41 Miss. 65, 69 (1866) (false statements relied on by another bar the

Because the agreements in both *Sanders* and *Anderson Construction* involved the sale of goods, the Uniform Commercial Code's statute of frauds should have governed. However, in *Sanders* the doctrine of promissory estoppel was allowed to defeat the requirements of the statute of frauds.[27]

Despite the equitable results reached in both cases, the enforceability of oral sales contracts as dictated by the statute[28] has been placed in serious question. Nevertheless, the court expressly disavowed any intent to limit the statute of frauds in two recent decisions, *Thomas v. Prewitt*[29] and *Anderson Construction.*[30] The net effect of the decisions is that rather than a strict rule for lower courts to follow, whether the statute of frauds will apply in a particular situation cannot be determined positively until each case is appealed to the supreme court.

It is submitted that section 217A of the second *Restatement of Contracts* could have been applied in *Sanders* and *Anderson Construction* to obtain the same results reached by the court. Section 217A provides generally that if injustice can be avoided only by enforcing the oral promise, then the statute of frauds requirements may be circumvented.[31] Furthermore, section 217A provides specific guidelines to determine when injustice can be avoided only by enforcement of the promise.[32] Although section

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speaker's recovery on the subject).

[27] *See* notes 17 and 22 *supra*. The court in *Sanders* agreed that the oral agreement was not divisible as to the sale of goods and non-goods, but applied the promissory estoppel doctrine to the commercial transaction nevertheless. 375 So. 2d at 776. Though the court in *Anderson* recognized that the contract was for goods and services, it concluded that it was primarily for goods and that § 75-2-201 was clearly applicable. 370 So. 2d at 937-38 (citing Bonebreak v. Cox, 499 F.2d 951 (8th Cir. 1974), and Port City Constr. Co. v. Henderson, 266 So. 2d 896 (Ala. App. 1972)).

[28] MISS. CODE ANN. § 75-2-201 (1972). *See* note 10 *supra*.

[29] 355 So. 2d 657 (Miss. 1978). *See* note 17 *supra*.

[30] 370 So. 2d 935 (Miss. 1979). *See* notes 11 through 17 and accompanying text *supra*.

[31] RESTATEMENT (SECOND) OF CONTRACTS § 217A (1963) provides in part:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for the breach is to be limited as justice requires . . . .

[32] RESTATEMENT (SECOND) OF CONTRACTS § 217A (1963) further provides:

> In determining whether injustice can be avoided only by enforcement of the

217A is not mentioned in the foregoing cases, its obvious applicability in those situations impels its use in the future.

B. Parol Evidence

Two of the contract cases decided by the Supreme Court of Mississippi in 1979 involved the admissibility of parol evidence of trade usage and custom to interpret road construction contracts.[33] The first case will be treated only parenthetically,[34] while the second case merits textual commentary because of the tangential issues involved.

In *Mississippi State Highway Commission v. Dixie Contractors, Inc.*,[35] Dixie, upon performing the Commission's construction contract,[36] filed a bill in chancery praying for additional compensation in accordance with the contract's terms.[37] All of the technical and complex documents composing the contract had been drafted by the Commission.[38] While the chancel-

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> promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor.

[33] Mississippi State Highway Comm'n v. Dixie Contractors, Inc., 375 So. 2d 1202 (Miss. 1979); O.J. Stanton & Co. v. Mississippi State Highway Comm'n, 370 So. 2d 909 (Miss. 1979).

[34] *See* note 47 *infra*.

[35] 375 So. 2d 1202 (Miss. 1979).

[36] The Commission released for bids a contract replete with written specifications for the excavation, hauling, stockpiling and filling of various materials along the route of an interstate highway under construction. *Id.* at 1203. Dixie was awarded the contract and performed its end of the bargain. When payment was tendered by the Commission, however, Dixie refused, contending that the amount was insufficient. *Id.*

[37] The contract terms, though very complicated, were generally as follows: the Commission was to pay 62¢ per cubic yard of unclassified excavation fill material and $1.45 per cubic yard of unclassified excavation fill plating material. *Id.* at 1203-04. The controversy arose when Dixie asserted that, according to its interpretation of the contract, the Commission should pay for hauling plating material from stockpile to embankment at the $1.45 pay rate. The Commission maintained that the 62¢ per cubic yard already paid was the proper compensation. *Id.* at 1204.

[38] *Id.* at 1203-04.

lor admitted some oral testimony touching on the writings,[39] other parol evidence offered by the Commission to explain the contractual terms was not allowed, apparently because the parties had stipulated to all of the writings.[40]

The supreme court reversed the chancellor's rulings, stating that the testimony should have been admitted because it was relevant.[41] Also, the court indicated that the trade usage exception to the parol evidence rule should have been invoked[42] in accordance with prior case law[43] and two Mississippi statutes

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[39] *Id.* at 1205. The Commission's project engineer acknowledged that a 10% cost variance would be normal. Also, the original figures were admitted in the writings themselves to be only estimates. In fact, the Commission's final approved total quantities were 200% above the original proposals, and Dixie's final figures were an approximate increase of 400% over the Commission's final totals. However, the award granted to Dixie as additional compensation by the chancellor did not cause the final cost of the contract to exceed the normal 10% cost variance, even based upon the Commission's original estimates. *Id.*

[40] *Id.* at 1204.

[41] *Id.* at 1205. The court explained that "[r]elevancy requires only that the proffered evidence appear calculated to alter the probabilities of some fact of consequence in the suit." *Id.* For a general discussion of the parol evidence rule, see 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2400, at 3 (3d ed. 1940).

[42] 375 So.2d at 1205-06. As to the trade usage exception to the parol evidence rule, the *Dixie* court remarked: "[T]he drafting party's [parol] evidence aimed at clearing the ambiguity by showing reasonable commercial understandings, concerning the meanings of technical terms, arising from usage of trade or a course of performance [should be admitted]." *Id. See generally* 30 AM. JUR. 2d *Evidence* § 1074, at 220-21 (1967).

[43] 375 So.2d at 1205. One case cited by the court was Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975). In *Paymaster Oil,* the controversy involved the interpretation of a contract for the sale of beans, which had incorporated a prior conversation by reference. The court held that parol testimony was admissible to explain or supplement a writing which was not intended to be the exclusive statement of the agreement. *Id.* at 657.

A case that is more on point with *Dixie* is O.J. Stanton & Co. v. Mississippi State Highway Comm'n, 370 So. 2d 909 (Miss. 1979). In *O.J. Stanton* the supreme court held the lower court in error for disallowing parol evidence of usage and custom to explain provisions that were ambiguous and required interpretation of complex and technical construction contracts. *Id.* at 915. Factually, the two cases are similar. Both *O.J. Stanton* and *Dixie* involved road construction contracts with the Mississippi State Highway Commission. In both cases the Commission had drafted the documents constituting the contract and the contractors had prayed for additional compensation. In *O.J. Stanton,* however, the contractor sought recovery for additional expenses caused by the Commission's allegedly unwarranted decisions that produced unanticipated and expensive delays. *Id.* at 911.

The trade usage exception is also disscussed in other Mississippi decisions. *See, e.g.,* that allow such an exception in contracts for the sale of goods.[44] While acknowledging the well-established rule that ambiguities in written contracts should be construed unfavorably against the drafting party,[45] the court rejected the applicability of the rule in this case.[46] Finally, the court noted that, because the case had to be determined by construction of documentary evidence, the manifest error rule had little, if any, application.[47]

The rationale in *Dixie,* though somewhat inaccurate,

Fireman's Fund Ins. Co. v. Williams, 170 Miss. 199, 211, 154 So. 545, 547 (1934) (custom may be read into contracts or may be used to construe a contract, but the law of usage and custom may not be employed by the courts to make the parties' contract); Burbridge v. S. Gumbel & Co., 72 Miss. 371, 378, 16 So. 792, 793 (1895) (a contract between parties engaged in a certain trade includes the usages of that trade, but usages will not prevail where specific stipulations in the contract contradict the possible interpretation). *But see* Noble v. Logan-Dees Chevrolet-Buick, Inc., 293 So. 2d 14, 15 (Miss. 1974), *noted in* 46 Miss. L.J. 192 (1975) (in suit based on an installment sales contract of an automobile the evidence did not establish a trade usage or course of performance so as to allow evidence of an oral promise to vary the terms of the written contract); Magnolia Lumber Corp. v. Czerwic Lumber Co., 207 Miss. 738, 746-47, 43 So. 2d 204, 205-06 (1949) (a lawful and valid contract between the parties requires the exclusion of evidence of custom and usage).

[44] 375 So. 2d at 1205. The statutes cited by the court for comparison were Miss. Code Ann. §§ 75-1-205 and 75-2-202(a) (1972). These two sections are provisions of the Uniform Commercial Code which, of course, was enacted to govern commercial transactions involving the sale of goods. According to Mississippi law, the provisions of the U.C.C. "shall be liberally construed and applied to promote its underlying purposes and policies." *Id.* § 75-1-102. *See* Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657 (Miss. 1975) (parol evidence allowed to interpret sales contract). *But see* Noble v. Logan-Dees Chevrolet-Buick, Inc., 293 So. 2d 14, 15 (Miss. 1974) (parol evidence not allowed to interpret contract for sale of an automobile).

[45] Boyd Constr. Co. v. T.L. James & Co., 477 F.2d 34, 36 (5th Cir. 1973); Dabbs v. International Minerals & Chem. Corp., 339 F. Supp. 654, 662 (N.D. Miss. 1972); Baton Rouge Contracting Co. v. West Hatchie Drainage Dist., 304 F. Supp. 580, 589 (N.D. Miss. 1969); United States *ex rel.* Sanford v. Continental Cas. Co., 293 F. Supp. 816, 822 (N.D. Miss. 1968); Cameron v. Chuck Ryan Cars, 374 So. 2d 1305, 1307 (Miss. 1979); Clark v. Carter, 351 So. 2d 1333, 1336 (Miss. 1977); Stampley v. Gilbert, 332 So. 2d 61, 63 (Miss. 1976); Love Petroleum Co. v. Atlantic Oil Producing Co., 169 Miss. 259, 269, 152 So. 829, 831 (1934); Home Mut. Fire Ins. Co. v. Pittman, 111 Miss. 420, 423, 71 So. 739, 740 (1916).

[46] 375 So. 2d at 1205-06. The court refused to permit the rule to prevent the drafting party from introducing parol evidence to clear up ambiguities in its own documents. *Id.*

[47] *Id.* at 1206. According to S & A Realty Co. v. Hilburn, 249 So. 2d 379 (Miss. 1971), where there is no oral testimony of witnesses, the supreme court may reverse a chancellor if he erred in interpreting the documents, whether or not he was manifestly wrong. *Id.* at 381-82.

presents a curious paradox. First, because the contract was ambiguous, the trial court erred in excluding supplemental oral testimony of the drafting party.[48] Second, the ambiguities in the written contract were resolved in favor of the drafting party, notwithstanding the possibility of an inequitable result and the contrary rule in Mississippi.[49] Third, because the determination of the case rested upon construction of written instruments, a finding that the chancellor was manifestly in error was not a prerequisite for reversal.[50] Thus, despite its own drafting mistakes, the Commission was relieved of the burden of paying the additional compensation expected by Dixie when it formulated its bid price. Also, the apparently misplaced reliance on certain statutes and case law[51] makes reconciliation of the court's ruling on the manifest error argument with the parol evidence rule argument even more difficult.

Additionally, in holding that parol evidence of trade usage and custom may be admitted to explain a written contract, the court ignored a prerequisite to application of the exception:[52] for parol evidence to be admitted, there must first be an adjudication that the documents constituting the agreement were not intended to and did not represent the entire and exclusive statement of the mutual agreements and obligations of the parties.[53]

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[48] *See* notes 41 through 44 and accompanying text *supra.*

[49] *See* notes 45, 46 and accompanying text *supra.*

[50] *See* note 47 and accompanying text *supra.*

[51] *See* notes 43, 44 and accompanying text *supra.*

[52] *See* note 43 *supra.*

[53] Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657-58 (Miss. 1975). *Paymaster Oil* was heard by Justices Patterson, Sugg and Walker; *Dixie* was heard by Justices Inzer, Patterson and Sugg. The *Paymaster Oil* court cited MISS. CODE ANN. § 75-2-202 (1972) as controlling whether parol evidence of custom and trade usage could be properly introduced. In *Paymaster Oil,* the court stated:

> We ascertain the legislative intent from [MISS. CODE ANN. § 75-2-202 (1972)] to be that parol evidence may not be used to contradict the terms of confirmatory memoranda of a written agreement intended as the final expression of a contract, *but that it might be explained or supplemented by evidence of consistent additional terms unless there be an adjudication the writing was intended as an exclusive statement of the agreement.*

319 So. 2d at 647 (emphasis added). The *Paymaster Oil* court implied that the converse of the above statement was also required. Thus, the court repeatedly stated that, in its opinion, the contract in dispute was not intended by the parties to be the final or exclusive statement of the contract. *Id.* Consequently, the court concluded that parol evidence

In *Dixie* the issue was neither raised nor argued by the parties, since the documents had been stipulated, nor was it addressed by the court, despite previous holdings that such a determination was necessary.

II. Domestic Relations

During 1979, the Mississippi Supreme Court rendered nine decisions in the domestic relations area.[54] Three of these cases, all of which concern child support,[55] merit textual commentary.

A. Emancipation of Children

The Mississippi Supreme Court addressed an issue of first impression in 1979 in *Moore v. Moore.*[56] In that case Mr. Moore attempted to reduce his child support payments as each child became emancipated[57] without first obtaining a court ordered

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was properly admitted to bring the entire contract before the court. *Id.* at 658. It must be reiterated that the documents constituting the contract in *Dixie* were admitted into evidence by stipulation of the parties. 375 So. 2d at 1204.

[54] Three of the decisions are discussed textually. The other decisions include McIntosh v. McIntosh, 378 So. 2d 629, 631 (Miss. 1979) (supreme court affirmed the lower court's denial of special findings of fact, reversed chancellor's decision not to allow alimony and awarded $10,000 lump sum alimony); Brashers v. Green, 377 So. 2d 597, 599 (Miss. 1979) (harmless error in dismissing for lack of jurisdiction because hearing proceeded to judgment in habeas corpus proceeding); Pittman v. Pittman, 375 So. 2d 415, 416 (Miss. 1979) (death of the wife before the final divorce decree was entered ended the marriage); McKinney v. McKinney, 374 So. 2d 230, 232 (Miss. 1979) (first decree requiring husband to pay child support was void for lack of valid service of process; second decree was affirmed); Rogers v. Rogers, 373 So. 2d 816, 817-18 (Miss. 1979) (supreme court refused to change the "manifest error" rule); and Shaeffer v. Shaeffer, 370 So. 2d 240, 242 (Miss. 1979) (reaffirming the principle that a decree can be modified only if there has been a material change in circumstances).

[55] Litigation is rife in the child support area for several reasons. First, the duty to support a child is a continuing obligation. Walters v. Walters, 180 Miss. 268, 274-75, 177 So. 507, 508 (1937) (father's duty to support child could not be ended by a lump sum settlement). Second, the husband's obligation to support his child continues upon the wife's remarriage. Vaughan v. Vaughan, 226 Miss. 153, 160-61, 83 So. 2d 821, 824-25 (1955). However, the obligation to support the child does terminate with the father's death unless there is a written agreement to the contrary. Smith v. Smith, 349 So. 2d 529, 531 (Miss. 1977).

[56] 372 So. 2d 270 (1979).

[57] Emancipation has been defined as "the legal process by which a child is released from the authority and control of his parents." H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 8.3, at 240 (1968). The theory of emancipation has its

modification.[58] Mrs. Moore had legal custody of the couple's five children, and Mr. Moore had been ordered to pay seventy-five dollars per week as child support.[59] Mr. Moore had reduced the payments pro rata as each child became self-supporting or moved in with the defendant.[60] The supreme court held that Moore could not reduce the payments without a court ordered modification of the decree where more than one child was involved.[61] The court listed three reasons for its decision.[62] First, the court reasoned that the seventy-five dollar payment was probably a family group figure, and not reducible to fifteen dollars per child.[63] Second, the court noted that in many cases the child support figure reflects the ability of the parent to pay, and not the amount actually necessary to support the children.[64] Third, the court pointed out that since each child's needs are different the amount of money needed for support can vary widely.[65]

The conclusion of the court follows the general rule,[66] and in reaching its decision the court also consulted the law of other

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origins in the Roman law. *See* W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 131 (3d ed. 1963). As the theory developed, emancipation became identified with the child's reaching 21, marrying, or leaving home. H. CLARK, *supra,* § 8.3, at 241-42. *See generally* Annot., 165 A.L.R. 723 (1946).

[58] Mrs. Moore filed a petition citing Mr. Moore for contempt because of his self-imposed reductions in payments. She alleged that he owed $5,100 in child support payments. 372 So. 2d at 271.

[59] *Id.*

[60] *Id. See generally* 1 ARK. L. REV. 314 (1944) (effect of child's majority on support decree).

[61] 372 So. 2d at 271-72.

[62] The three reasons cited by the court are almost identical with the ones enumerated by the Connecticut Supreme Court in Delevett v. Delevett, 156 Conn. 1, 238 A.2d 402, 404 (1968).

[63] 372 So. 2d at 271. *See generally* Annot., 2 A.L.R.3d 596, 611 (1965).

[64] 372 So. 2d at 271-72.

[65] *Id.* at 272.

[66] In 2 W. NELSON, DIVORCE AND ANNULMENT § 14.91, at 127-28 (2d ed. 1961), the general rule is stated as follows:

> In the absence of an agreement providing otherwise, the allowance for support of a child is ordinarily limited to his or her minority. However, where one monthly sum is awarded for support of several minor children during their minority, it will be considered as providing monthly payments of such sums until the youngest child has obtained his majority.

jurisdictions.[67] Since child support awards rarely reflect the amount realistically needed for the support of a child, the decision by the court not to allow the father to reduce child support payments is an equitable one.[68] The effect of *Moore* will be to force the father into court to determine if the support payments should be reduced; thus, the decisions will be made on a case by case basis.

B. Liability of Father for Back Child Support Payments

In the past, the prevailing rule in Mississippi has been that a father was obligated to continue making child support payments, whether or not the wife abided by the terms of the child custody decree.[69] Therefore, if the wife refused the father his visitation rights, he was still duty bound to make support payments.[70]

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[67] The court cited Delevett v. Delevett, 156 Conn. 1, 238 A.2d 402, 404 (1968) (husband could not reduce payments automatically upon emancipation of a child); Guthrie v. Guthrie, 429 S.W.2d 32, 36 (Ky. 1968) (because divorce decree was unclear whether the award was per child, husband not allowed to reduce payments); and Eaglin v. Eaglin, 306 So. 2d 375, 377 (La. App. 1974) ($115 per month lump sum for six children required court ordered modification). For cases not cited by the court that reached an opposite result, see Codorniz v. Codorniz, 34 Cal. 2d 811, 215 P.2d 32, 36 (1950) (husband no longer obligated to support children who had attained majority); Ditmar v. Ditmar, 48 Wash. 2d 373, 293 P.2d 759, 760 (1956) (husband could modify where obligation was to support only until emancipation occurred).

[68] Had the child support decree established a specific amount to be paid for each child, the court would have been obliged to decide whether to permit a pro rata reduction. *See* Eaglin v. Eaglin, 306 So. 2d 375, 377 (La. App. 1974) (father may petition the court to reduce payments as each child reaches majority).

[69] The pertinent statute in Mississippi charges the father and mother with equal responsibility for the support of their children. MISS. CODE ANN. § 93-13-1 (1972). However, the Mississippi Supreme Court has stated that, based on the marriage contract, the father is primarily liable for support. Kearney v. Kearney, 178 Miss. 766, 772, 174 So. 59, 60 (1937). One reason given for the rule that the father must continue to make payments even if the mother fails to abide by the terms of the decree is the following: "The Supreme Court also held that noncompliance on the part of the mother with provisions of the custody decree will not excuse the father from his duty under the decree to render support to the child, the rationale of that decision being the welfare of the child." J. BUNKLEY & W. MORSE, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI § 9.00, at 233 (1957) (citing Lide v. Lide, 201 Miss. 849, 30 So. 2d 51 (1947)).

[70] Lide v. Lide, 201 Miss. 849, 854, 30 So. 2d 51, 52 (1947). In *Lide*, the father had been granted the right to see the child at such times as were "suitable and convenient." The opinion is silent as to the mother's reasons for denying the father's visitation rights, but does state that "[h]e is not relieved therefrom [of his obligation to make support

In 1979, in *Cole v. Hood,*[71] the Mississippi Supreme Court broke with precedent and held that since the wife and her present husband had willfully concealed the children from their father for a period of eight years,[72] the father was not liable for past due child support payments.[73] The court based its decision on the equitable maxim of "he who comes into equity must come with clean hands."[74] Since Mrs. Cole's conduct had been wrong, the supreme court affirmed the lower court's denial of back child support payments from the children's father.[75]

The decision in *Cole* may have a great impact on future Mississippi decisions. If the court applies the *Cole* rationale to cases involving less willful and wanton conduct by the wife, the decision will overturn past case law and establish new precedent for future cases. On the other hand, if the court restricts its application of the "clean hands" doctrine to such extreme cases as *Cole,* the decision will be of limited precedential value. Certainly, the approach taken by the court in *Cole* is an equitable one.

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payments] because of any misconduct of the child's mother. . . ." *Id.* The court concluded that the proper remedy in such a situation was for the lower court to modify the decree. *Id.*

[71] 371 So. 2d 861 (Miss. 1979).

[72] Custody of the children was awarded to Mrs. Cole in the divorce decree. *Id.* at 862.

[73] *Id.*

[74] In discussing the "clean hands" maxim, Griffith states: "It is the meaning and purpose of this maxim to declare that no person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by wilful inequity, or illegality." V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 42, at 43-44 (2d ed. 1950). A chancellor does not need a motion by a party to apply the doctrine; instead he must apply it when necessary. Thigpen v. Kennedy, 238 So. 2d 744, 746-47 (Miss. 1970). The chancellor applied the maxim in *Cole* because Hood argued laches rather than the unclean hands doctrine. 371 So. 2d at 863. Furthermore, "[t]he maxim as to clean hands is more frequently sought to be applied in equity cases than was formerly urged, and it has been notably availed of lately in subjects within the jurisdiction of the chancery court other than in those in equity." V. GRIFFITH, *supra,* § 42a, at 44. *See* Taliaferro v. Ferguson, 205 Miss. 129, 142-43, 38 So. 2d 471, 473 (1949) (maxim applied where husband, who was in contempt for refusal to abide by terms of divorce decree, attempted to have decree modified).

[75] 371 So. 2d at 864.

C. Full Faith and Credit

In the 1979 decision of *Hinds v. Primeaux,*[76] the plaintiff, Mrs. Primeaux, ex-wife of the defendant, Hinds, filed suit in Mississippi for enforcement of a Louisiana divorce decree that awarded her monthly child support payments.[77] Mr. Hinds, relying on *Gallant v. Gallant,*[78] contended that the court could not give full faith and credit[79] to the decree because the Louisiana court could at any time reverse or modify the decision. In *Gallant,* the Mississippi Supreme Court held that the courts of Mississippi could not give full faith and credit to a Louisiana decree for support because the Louisiana court retained jurisdiction to amend or revise the decree.[80] Subsequently, however, the Louisiana Supreme Court in *Snow v. Snow*[81] held that the *Gallant* court was in error because, under Louisiana law, past due child support payments cannot be altered by the court rendering the decree.[82] Thus, in *Hinds,* the Supreme Court of Mississippi overruled *Gallant* with respect to jurisdictions where monthly child support payments are final.[83] The effect of *Hinds* is to give full faith and credit to the past due payments which have become final by decree under Louisiana law; consequently, Hinds was held liable.[84]

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[76] 367 So. 2d 925 (Miss. 1979).

[77] Mr. Hinds had moved to Harrison County, Mississippi. The decree awarding Mrs. Primeaux child support and alimony was rendered in Lafayette Parish, Louisiana, in 1969. Primeaux received a judgment againt her ex-husband in 1973 after he failed to make the child support payments. *Id.* at 926-27.

[78] 154 Miss. 832, 123 So. 883 (1929), *noted in* 4 Tul. L. Rev. 660 (1930).

[79] U.S. Const. art. IV, § 1. This section provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." In the early case of Fanchier v. Gammill, 148 Miss. 723, 737-38, 114 So. 813, 814, (1927) the Mississippi Supreme Court held that a decree awarding alimony could be given full faith and credit. The United States Supreme Court has also faced the question whether alimony and child support awards are entitled to full faith and credit. *See* Sistare v. Sistare, 218 U.S. 1, 17 (1909) (past due payments are entitled to full faith and credit unless discretionary with court rendering the decree); Lynde v. Lynde, 181 U.S. 183, 187 (1901) (only alimony judgment currently payable must be given full faith and credit when future alimony is discretionary with the court issuing decree); Barber v. Barber, 62 U.S. (21 How.) 582, 595 (1858) (where one state awards alimony that becomes past due, award is given full faith and credit in another state).

[80] 154 Miss. at 845, 123 So. at 887.

[81] 188 La. 660, 177 So. 793 (1937). The Louisiana court pointed out that past due installments for alimony are final in Louisiana and cannot be modified or amended. 177 So. at 801. In Louisiana, alimony encompasses child support. 367 So. 2d at 928. *See generally* Annot., 157 A.L.R. 170 (1945).

[82] 177 So. at 800-01.

The decision by the *Hinds* court follows the traditional line of reasoning that support orders are given full faith and credit only if final.[85] Nevertheless, as one author has noted, there is a trend toward allowing enforcement of support orders even when they are not final.[86] If all child support orders were given reciprocal enforcement, whether final or not, the result would likely be more uniformity and less confusion in this area.[87] Since the full faith and credit clause does not mention finality of judgments,[88] judicial enforcement of all child support orders would not violate the Constitution. The court could rationalize the decision on the basis of comity, the principle that encourages states to "respect the judgements of another even in the absence of an obligation to do so."[89] By enforcing orders whether final or not, the court would prevent a parent from escaping his or her duty of supporting the innocent children.[90]

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[83] 367 So. 2d at 928. It is curious that the court did not mention two earlier cases, Hatrak v. Hatrak, 206 Miss. 239, 39 So. 2d 779 (1949), and Compton v. Compton, 188 Miss. 670, 196 So. 635 (1940), in the *Hinds* opinion. In *Compton* the plaintiff was seeking to enforce a Louisiana divorce decree awarding alimony to her. The court noted the *Snow* decision, and held that the final, past due installments were enforceable. *Id.* at 678, 196 So. at 636. In *Hatrak*, the plaintiff was seeking enforcement of a foreign divorce decree providing for $50 per month child support. The court cited *Gallant* and pointed out that the decision was changed by *Compton* in light of the Louisiana Supreme Court's decision in *Snow*. 206 Miss. at 257-58, 39 So. 2d at 781-82. In effect, *Compton* and *Hatrak* overruled *Gallant* with respect to final orders of foreign jurisdictions awarding past due installments. However, the *Hinds* case expressly overruled the *Gallant* decision:

> It is therefore necessary that we overrule the Mississippi case of *Gallant v. Gallant* . . . insofar as it held that the Louisiana laws and decisions required a finding that the monthly child support payments were not final and, therefore, not enforceable in Mississippi under the full faith and credit clause of the Constitution.

367 So. 2d at 928.

[84] 367 So. 2d at 928.

[85] J. BROCKELBANK, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT 12 (1960).

[86] *Id. See* Scoles, *Enforcement of Foreign "Non-Final" Alimony and Support Orders,* 53 COLUM. L. REV. 817, 819-21 (1953). Justice Jackson in his concurring opinion in Barber v. Barber, 323 U.S. 77, 87-88 (1944) took the position that alimony decrees should be enforceable whether final or not. *See* Light v. Light, 12 Ill. 2d 502, 147 N.E.2d 34, 40 (1958) (full faith and credit given to future payments).

[87] Scoles, *supra* note 86, at 821, describes the policy reasons for enforcing non-final orders: "The Federal Constitution was designed to weld the states into one nation. We are not a collection of independent and jealous states, each attempting to discriminate against the others." *Id.*

[88] U.S. CONST. art. IV, § 1. *See* Barber v. Barber, 323 U.S. 77, 87 (1944) (Jackson, J., concurring) (the full faith and credit clause does not require finality).

D. *Legislative Enactments*

The legislature enacted two bills in the domestic relations area during the 1979 session. One, which was obviously in response to the United States Supreme Court decision in *Orr v. Orr*,[91] amended the Mississippi alimony statute to include the power of the court to award alimony to males.[92] The legislature, however, did not amend any of the other gender based statutes; these laws thus remain subject to constitutional attack.[93] Also, the legislature enacted the Mississippi Adoption Supplemental Benefits Act of 1979, designed to grant financial benefits to special categories of children in order to encourage their adoption.[94]

III. MUNICIPALITIES

Although several decisions were rendered concerning municipalities in 1979, none merit textual commentary. The decisions included cases dealing with various aspects of city ordinances, such as publication and filing requirements.[95] Others reaffirmed the principle that a change in zoning will not be made unless there was a mistake in the original zoning decision.[96] Also, two cases involving municipalities are noted in other portions of this review.[97] The legislature passed several bills affecting municipalities in 1979, most of which were of minor importance.[98] However, one significant new act provides an alternative method of incorporation for unincorporated areas.[99]

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[89] H. CLARK, *supra* note 57, § 41.11, at 478.

[90]
> It appears that the trend of state legislatures and decisions is toward more extensive enforcement of foreign support obligations and will quite probably be reflected in future consitutional cases. This tide of change is exemplified by the fact that all states have passed a Uniform Support Act in one form or another.

21 MERCER L. REV. 675, 683 (1969-70). The Uniform Reciprocal Enforcement of Support Act is in effect in Mississippi. MISS. CODE ANN. §§ 93-11-1 to -65 (1972). The procedure provided in the statute is in addition to any other remedies available. *Id.* § 93-11-7.

[91] 440 U.S. 268 (1979) *noted in* 65 A.B.A.J. 804 (1979). In this case, the Supreme Court declared Alabama's alimony statute, which provided for alimony awards to females only, unconstitutional on equal protection grounds. 440 U.S. at 283.

[92] Act of April 18, 1979, 1979 Miss. Laws ch. 497 (amending MISS. CODE ANN. § 93-5-23 (1972)).

[93] J. BUNKLEY & W. MORSE, *supra* note 69, at prefatory note of 1980 Supplement.

[94] Act of April 18, 1979, 1979 Miss. Laws ch. 510, *codified at* MISS. CODE ANN. §§ 93-17-51 to -67 (Supp. 1979).

[95] Lepre v. D'Iberville Water and Sewerage Dist., 376 So. 2d 191, 195 (Miss. 1979)

IV. TAXATION

Although the 1979 Mississippi Supreme Court dealt with five cases concerning taxation, none merit textual treatment. The cases involve exemption,[100] sales taxation on services pro-

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(supreme court upheld ordinance requiring all residences to hook up to water system); City of Carthage v. Walters, 375 So. 2d 228, 230 (Miss. 1979) (city ordinance of no effect where it failed to meet publication requirements of MISS. CODE ANN. § 21-13-11 (1972)); Yellow Cab v. City of Biloxi, 372 So. 2d 1274, 1276 (Miss. 1979) (licenses improperly granted to cab company because the ordinance did not meet filing requirements of MISS. CODE ANN. § 21-13-3 (1972)); Brown v. City of Meridian, 370 So. 2d 1355, 1355-56 (Miss. 1979) (police officer reinstated where ordinance under which he was dismissed did not comply with publication and recordation requirements of MISS. CODE ANN. § 21-9-51 (1972)); Kynerd v. City of Meridian, 366 So. 2d 1088, 1088 (Miss. 1979) (hardship exemption in zoning ordinance rejected where requirements of ordinance were not met).

[96] Watts v. City of Wiggins, 376 So. 2d 1072, 1073-74 (Miss. 1979) (cannot seek relief under and attack an ordinance in the same hearing; must be a mistake for zoning reclassification to occur); Sullivan v. City of Bay St. Louis, 375 So. 2d 1200, 1201 (Miss. 1979) (property should not be rezoned from family duplex to multi-family unless there was a mistake).

[97] Little v. City of Jackson, 375 So. 2d 1031 (Miss. 1979) (administrative law); City of Laurel v. Powers, 366 So. 2d 1079 (Miss. 1979) (property). One other case involving municipalities was City of Jackson v. Capital Reporter Publishing Co., 373 So. 2d 802, 807 (Miss. 1979) (letting of public contract to two newspapers for publication of legal notices).

[98] *E.g.*, Act of March 15, 1979, 1979 Miss. Laws ch. 370, *codified at* MISS. CODE ANN. § 43-9-47 (Supp. 1979) (authorizing a municipality to match federal funds for assistance to the elderly); Act of April 18, 1979, 1979 Miss. Laws ch. 494 (amending MISS. CODE ANN. § 17-13-7 (1972)) (providing for relocation of railroad lines).

[99] Act of April 18, 1979, 1979 Miss. Laws ch. 470, *codified at* MISS. CODE ANN. §§ 21-1-67 to -79 (Supp. 1979). The method in existence prior to this act is found in *id.* § 21-1-13 (1972). An area with a population of 15,000 or more can choose to incorporate according to the method in *id.* § 21-1-13 or the procedure outlined in the new act.

[100] In Local Union No. 845 v. Lee County Board of Supervisors, 369 So. 2d 497 (Miss. 1979), a five-to-four decision, the court held that to prove entitlement to an exemption from ad valorem taxation, an organization must show that it is within the letter of the exemption, with all reasonable doubts being resolved against the exemption. *Id.* at 499. The denied application was for exemption under MISS. CODE ANN. § 27-31-1(d)

vided to mineral producers,[101] and local and municipal taxation problems.[102]

V. Wills and Estates

The supreme court was confronted with relatively few appeals in the wills and estates area in 1979;[103] nevertheless, there

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(1972), which provides for a tax exemption to all "fraternal and benevolent organizations." The majority concluded that, although the organization was concededly fraternal in nature, the organization's primary functions were self-serving and its benevolent aspects were incidental. 369 So. 2d at 498 n.1, 499. Thus, the court held that since the applicant was not both fraternal and benevolent it was not entitled to the exemption. *Id.* at 499. The minority, maintaining that the statute requires only that a fraternal organization's activity include benevolent acts, would have allowed the exemption. *Id.* The dissenters indicated that the majority opinion failed to specify whether qualification for the exemption required a majority of the fraternal organization's activities to be of a benevolent character. *Id.* at 499-500. For a general discussion of ad valorem taxation in Mississippi, see Robertson, *Problems of Valuation and Equalization in Mississippi's Ad Valorem Tax System,* 48 Miss. L.J. 201 (1977).

[101] In Brady v. Getty Oil Co., 376 So. 2d 186 (Miss. 1979), the court held that the gross proceeds from oil field services rendered by one co-owner/operator for other co-owners of mineral producing properties in Mississippi were subject to sales tax under Miss. Code Ann. § 27-65-23 (1972), whether or not profit was realized on these activities and notwithstanding that such activities were purely secondary to the taxpayer's main business. 376 So. 2d at 186-87, 189.

[102] In Thompson v. Anding, 370 So. 2d 1335 (Miss. 1979), the court compared §§ 21-33-1, -21 and 37-7-615 of the Mississippi Code and held that where property added to a municipal separate school district lies outside the municipal limits, such property may not constitutionally be assessed differently for taxation purposes than property lying within the municipality. 370 So. 2d at 1337. For an illuminating discussion of the procedure and other aspects of municipal taxation in Mississippi, see Ross, *Municipal Taxation in Mississippi,* 39 Miss. L.J. 41 (1957). In Harris v. Harrison County Bd. of Supervisors, 366 So. 2d 651 (Miss. 1979), the court held that where a local assessment is for a proper purpose and the tax levy is equal and uniform throughout the district, the authorizing state law violates neither the constitutional requirement of statewide uniform and equal taxation, nor the constitutional prohibition against special and private laws where general laws will suffice. *Id.* at 654-55. In Associates Capital Corp. v. Alexander, 374 So. 2d 218 (Miss. 1979), the supreme court held that a municipal tax sale occurring prior to the enactment of Miss. Code Ann. § 27-43-4 (Supp. 1979) (effective October 1, 1975), is not subject to the notice provisions of *id.* §§ 37-43-1 and 37-43-3 (1972). 374 So. 2d at 219-21. The court also held that such a municipal tax sale is valid without the notices regardless of the fact that the redemption period expires after the effective date of § 27-43-4. *Id.*

[103] Cases not discussed textually include Rosenbaum v. Fliegelman, 375 So. 2d 223 (Miss. 1979) (court refused to set aside a codicil to a will and followed the intent of the testator rule); Smith v. Bank of Clarksdale, 374 So. 2d 776 (Miss. 1979) (after filing a petition for discharge, the executor was estopped from reopening the estate); Blackwell

are two decisions that are noteworthy. One decision circumvents the antiquated Mississippi mortmain provision;[104] the other marks an important step toward putting adopted children on an equal footing with natural children.[105]

A. *Mississippi Mortmain Provision*

Several states currently have mortmain statutes.[106] However, Mississippi is the only state with a mortmain provision in its constitution.[107] Section 270 of the Mississippi Constitution

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v. Hickman, 374 So. 2d 239 (Miss. 1979) (second probate dismissed following the discovery of earlier probate); and Nobles v. Sanders, 370 So. 2d 703 (Miss. 1979) (reaffirming the principle that the intention of the testator controls in construing a will).

[104] Crook v. Commercial Nat'l Bank & Trust Co., 375 So. 2d 1006 (Miss. 1979). *See* notes 107 through 140 and accompanying text *infra.*

[105] Dodds v. Deposit Guar. Nat'l Bank, 371 So. 2d 878 (Miss. 1979). *See* notes 141 through 171 and accompanying text *infra.*

[106] At common law there were no restraints on alienation to religious organizations. *See* E. FISCH, D. FREED & E. SCHACCTER, CHARITIES AND CHARITABLE FOUNDATIONS § 19 (1974). However, because large gifts were often made to the church, a conflict arose between church and state. Therefore, mortmain provisions developed to prevent the church's unbridled acquisition of property. *Id.* When the Industrial Revolution began in England, the restraints on alienation to religious societies were slowly relaxed. As a result, the Statute of Charitable Uses was enacted, providing for certain situations in which religious organizations could hold land. *See* 37 U. PITT. L. REV. 169, 169 (1975). In 1736, however, restrictions were once again placed on charitable gifts in the Georgian Statute of Mortmain. Under this statute, all gifts made within 12 months of the testator's death were void. *Id.* at 170. In 1960, the English Parliament abolished the mortmain law. *Id.* The English mortmain statutes were not incorporated into the common law of the United States. *See* 48 MISS. L.J. 145, 147 (1977) (citing 15 AM. JUR. 2d *Charities* § 45 (1964) and 79 *id. Wills* § 176 (1975)). The various state statutes include, *e.g.,* FLA. STAT. ANN. § 732.802 (West 1976); GA. CODE ANN. § 113-107 (1975); IDAHO CODE § 15-2-615 (Supp. 1976); IOWA CODE ANN. § 633.266 (West 1964); MISS. CODE ANN. § 91-5-31 (1972); MONT. REV. CODES ANN. § 91-142 (1947); N.Y. EST., POWERS & TRUSTS LAW § 3-3-3 (McKinney Supp. 1976); and OHIO REV. CODE ANN. § 2107.06 (Page 1976). The statutes can be divided into three categories: (1) those with time restrictions, (2) those with amount restrictions, and (3) those with a combination of amount and time restrictions. Note, *Mortmain Statutes: Questions of Constitutionality,* 52 NOTRE DAME LAW. 638, 639 n.10 (1977). Florida has a time period restriction. Pennsylvania and the District of Columbia had time period restrictions until the statutes were declared unconstitutional. Iowa and New York have amount restrictions. The rest combine restrictions. *Id.*

[107] MISS. CONST. art. 14, § 270. For a discussion of the history of the Mississippi mortmain provision, see 48 MISS. L.J. 145, 148-49 (1977). The constitutional provision states:

> No person leaving a spouse or child, or descendants of child shall, by will, bequeath or devise more than one-third of his estate to any charitable, religious, educational or civil institutions, to the exclusion of such spouse or child,

provides that no decedent survived by a spouse, child, or a descendant of a child, shall leave more than one-third of his estate to any "charitable, religious, educational, or civil institution."[108] Also, the will must be executed at least ninety days before the testator's death or the bequest is deemed void.[109] Though this section provides that land may otherwise be devised to one of the proscribed institutions, the recipient institution may hold the land for only ten years.[110] Section 91-5-31 of the Mississippi Code indicates further that when land is held as provided by the section, the institution may sell the land before the expiration of

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> or descendants of child, and in all cases the will containing such bequest or devise must be executed at least ninety days before the death of the testator, or such bequest or devise shall be void.
>
> Provided, however, that any land devised, not in violation of this section, to any charitable, religious, educational, or civil institution may be legally owned, and further may be held by the devisee for a period of not longer than ten years after such devise becomes effective, during which time such land and improvements thereon shall be taxed as any other land held by any other person, unless exempted by some specific statute.

MISS. CONST. art. 14, § 270.

Cases construing the Mississippi mortmain provisions include, in addition to the cases treated textually, Methodist Hosp. v. Slack, 330 So. 2d 882, 888-89 (Miss. 1976) (trust may not be used to circumvent mortmain statute); Crosby v. Alton Oschner Medical Foundation, 276 So. 2d 661, 665 (Miss. 1973) (ninety-day time limitation applies even if bequest constitutes less than one-third of estate); Mississippi College v. May, 235 Miss. 200, 222, 108 So. 2d 703, 712 (1959) (where trustee held land longer than ten years it reverted to the testator's heirs); Mississippi School for the Blind v. Armstrong, 216 Miss. 348, 357, 62 So. 2d 369, 372 (1953) (where bequest to school was more than one-third of estate, only residue would be voided); and Bell v. Mississippi Orphans Home, 192 Miss. 205, 216-17, 5 So. 2d 214, 216 (1941) (ninety-day limitation applies only if testator leaves a spouse or child). The current constitutional provision went into effect in 1940. For cases under the old section, see Coleman v. Whipple, 191 Miss. 287, 2 So. 2d 566 (1941); Old Ladies Home Ass'n v. Grubbs' Estate, 191 Miss. 250, 199 So. 287 (1940); Wright v. Mary Galloway Home for Aged Women, 186 Miss. 197, 187 So. 752 (1939); National Bank of Greece v. Sarrika, 167 Miss. 571, 148 So. 649 (1933); Anderson v. Gift, 156 Miss. 736, 126 So. 656 (1930); Greely v. Houston, 148 Miss. 799, 114 So. 740 (1927); Maas v. Sisters of Mercy, 135 Miss. 505, 99 So. 468 (1924); Hailey v. McLaurin's Estate, 112 Miss. 705, 73 So. 727 (1916); and Blackbourn v. Tucker, 72 Miss. 735, 17 So. 737 (1895).

[108] MISS. CONST. art. 14, § 270. This provision applies only when the testator leaves a member of the protected class—wife, child or descendants of a child. Bell v. Mississippi Orphans Home, 192 Miss. 205, 214-15, 5 So. 214, 216-17 (1941).

[109] MISS. CONST. art. 14, § 270. The time limitation applies to bequests of any portion of an estate but only if there is a surviving member of the protected class. Crosby v. Alton Oschner Medical Foundation, 276 So. 2d 661, 665 (Miss. 1973).

[110] MISS. CONST. art. 14, § 270.

the ten-year period and retain the proceeds.[111]

In 1979 the Supreme Court of Mississippi examined the mortmain provision in *Crook v. Commercial National Bank & Trust Co.*[112] In *Crook,* the decedent, Charles Weems, had devised his entire estate in trust for the benefit of his brother, Talmage Weems, a patient at East Mississippi State Hospital.[113] Weems's will provided that upon his brother's death, the income from the trust was to go to the hospital, with Commercial National Bank acting as trustee.[114] The bank held the land in trust for more than ten years following the death of Talmage Weems. Consequently, Crook and Wheless, the only heirs of the brothers, contended the ten-year limitation on devises to charitable institutions had been violated.[115] The court, holding that the trust arrangement did not violate the constitution,[116] stated that real estate can be devised to a proscribed institution in a testamentary trust for more than ten years where: (1) no restrictions on alienation are placed on the trustee;[117] (2) the property will not pass from the trustee to the beneficiary except in an armslength transaction; (3) the trustee upholds his fiduciary duty at all times; and (4) the trustees are independent of the beneficiary institution.[118] Justice Sugg dissented, reasoning that the majority decision allowed the hospital to circumvent the constitutional and statutory requirements.[119]

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[111] MISS. CODE ANN. § 91-5-31 (1972). The ten-year limitation applies whether or not there is a member of the protected class. Mississippi College v. May, 235 Miss. 200, 219, 108 So. 2d 703, 710 (1959). Mississippi is the only state with a limitation on the number of years the land can be held. *See* 48 MISS. L.J. 145, 151 (1977).

[112] 375 So. 2d 1006 (Miss. 1979).

[113] *Id.* at 1008. Charles Weems' will provided:

> I, Charles S. Weems, hereby will and deed to Commercial National Bank and Trust Company, Laurel, Mississippi, in trust my entire estate, real and personal and all monies to be made a trust fund for my brother Talmage Dewitt Weems at present a patient in East Mississippi Insane Hospital, Meridian, Miss. I give to Talmage D. Weems, the entire income from this trust fund after Talmage D. Weems death, I give the income from this trust fund to the East Insane Asylum, Meridian, Miss. to buy things for needy patients that the State does not buy. I appoint the Commercial National Bank and Trust Company, Laurel, Miss., administrator and guardian for Talmage Dewitt Weems.
>
> I solemly [sic] and affirmly swear this is my last will and testament.

Id.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 1012.

[117] *Id.* This factor was the downfall of the trust in an earlier case, Methodist Hosp. v. Slack, 330 So. 2d 882, 889 (Miss. 1976), *noted in* 48 MISS. L.J. 145 (1977). The *Crook* court distinguished *Methodist Hospital,* noting that in the latter, the bank trustee had no power to alienate the res of the trust. 375 So. 2d at 1011.

In reaching its decision, the court in *Crook* was forced to formulate a method of circumventing the application of the mortmain provisions. In the future this problem could be avoided by a judicial declaration of the unconstitutionality of the statute, or a repeal of the statute by the legislature[120] and a repeal of the constitutional provision by the electorate. Only a few states currently retain mortmain statutes[121] despite the modern trend toward their abolition. The basis of the argument for repeal of the mortmain provisions is that they violate the equal protection clause of the fourteenth amendment of the United States Constitution.[122] Until recently, mortmain statutes had withstood constitutional attack;[123] since equal protection claims have gained popularity, however, the remaining state statutes will, more than likely, succumb to constitutional attack in the future.

Recently, the Pennsylvania Supreme Court concluded that their state's mortmain statute was unconstitutional, thereby becoming the first state supreme court to invalidate a mortmain statute on equal protection grounds.[124] The Pennsylvania statute provided that a testator must execute his will at least thirty days prior to his death for a charitable bequest to be valid.[125] In *In re Cavill,*[126] the testatrix executed her will twenty-four days prior to her death, leaving the bulk of her estate to various charitable organizations.[127] Because the statute involved no fundamental right, the court applied a rational connection test, and required a "fair and substantial relation" between the statute and the legislative purpose of protection of families.[128] The Pennsylvania court held that the statute failed under the rational connection test since the thirty-day period created an arbitrary classification of testators.[129] The court pointed out that the statute divided testators into two groups: (1) testators whose wills were made within the thirty-day period and whose bequests were automatically invalidated without proof of undue influence; and (2) testators whose wills were executed thirty days prior to death and whose gifts were valid unless proper proof of undue influence was made.[130]

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[118] 375 So. 2d at 1012. This factor was fatal to the trust arrangement in Mississippi College v. May, 235 Miss. 200, 108 So. 2d 703 (1959). In *May,* the testator left a holographic will devising his 465 acre farm to Mississippi College. The college held the land for ten years, and failed to sell or convey the land before the expiration of the ten-year period. The supreme court held that the land reverted to the heirs. *Id.* at 219, 108 So. 2d at 710. In *Crook,* the *May* precedent was held inapplicable because the trustee and the beneficiary were independent of each other. 375 So. 2d at 1011.

[119] 375 So. 2d at 1012. Chief Justice Patterson, Justice Smith, and Justice Bowling took no part in the case. Justice Sugg in his dissent stated: "I dissent from the majority opinion because it permits East Mississippi State Hospital, a civil institution, to do indirectly what it cannot do directly." *Id.*

[120] California recently repealed its statute. CAL. PROB. CODE §§ 40-43 (West 1956) (repealed 1971). *See* NOTRE DAME LAW. Note, *supra* note 106, at 639 n.9 (1976).

[121] *See* note 106 *supra.*

[122] U.S. CONST. amend. XIV, § 1 provides: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See generally* Note, *Equal Protection,* 82 HARV. L. REV. 1065 (1969).

[123] *E.g.,* Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615, 617-18 (constitutionality of statute upheld), *appeal dismissed,* 323 U.S. 666, *reh. denied,* 323 U.S. 813 (1944); Decker v. American Univ., 236 Iowa 895, 20 N.W.2d 466, 469 (1945) (same); *In re* Kruger's Will, 23 A. D. 2d 667, 257 N.Y.S.2d 232, 233-34 (1965) (state has power to regulate testamentary dispositions).

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[124] *In re* Cavill, 459 Pa. 411, 329 A.2d 503, 505-06 (1974).

[125] 20 PA. CONS. STAT. ANN. § 2507(1) (Purdon 1975).

[126] 459 Pa. 411, 329 A.2d 503 (1974).

[127] 329 A.2d at 504.

[128] *Id.* at 506. A discussion of the tests used by the Supreme Court in examining the constitutionality of state statutes is beyond the scope of this commentary. For a discussion of the rational connection test, see Note, *Legislative Purpose, Rationality and Equal Protection,* 82 YALE L.J. 123 (1972); 11 CREIGHTON L. REV. 609 (1977).

[129] 329 A.2d at 503.

[130] *Id.* The District of Columbia Court of Appeals held their mortmain statute unconstitutional in *In re* Estate of French, 365 A.2d 621, 624 (D.C. App. 1976), *appeal dismissed,* 434 U.S. 59 (1977), *reh. denied,* 434 U.S. 1025 (1978), where the testator made a bequest to two religious institutions in a will executed 24 days prior to his death. D.C. CODE ANN. § 18-302 (1972) provided that any bequest made to a clergyman or religious institution in a will was invalid if made within 30 days of the testator's death. In reaching the conclusion that the statute violated equal protection, the court focused on the classifications of beneficiaries, rather than testators as in *Cavill:* "The statute in question creates two classes of beneficiaries: one class composed of clergymen and religious institutions and a second class encompassing all other beneficiaries. The issue therefore is whether this classification bears any rational relationship to the purpose of the statute." 365 A.2d at 623.

The inclusion of religious institutions in the Mississippi mortmain statute could be construed as a violation of the first amendment guarantee of freedom of religion. U.S.

The reasoning of the Pennsylvania court is applicable to the Mississippi statute. The Mississippi statute,[131] which is similar to Pennsylvania's, presumes that gifts made less than ninety days prior to death are the result of undue influence. Also, the Mississippi statute is subject to constitutional infirmity because it singles out the proscribed institutions, without making provision for other persons who may be "in an equally influential position to exert undue influence prior to the testator's death."[132]

Another major reason for repealing our mortmain statute, other than the likelihood of its unconstitutionality, is that it no longer serves its purpose. One purpose of the provision, as stated by the court in *Crook,* is to protect the family of the testator.[133] Protection of the family, however, is not a valid purpose for two reasons. First, children protected by the mortmain statute can still be disinherited under another provision of Mississippi law.[134] Second, the spouse needs no protection under the mortmain statute because he or she is provided for under the forced share statute.[135] The second stated purpose of the provision is to prevent the accumulation of wealth by charitable, educational, religious or civil institutions. This purpose is easily circumvented by an inter vivos gift or a testamentary trust as in *Crook.*

CONST. amend. I. *See* NOTRE DAME LAW. Note, *supra* note 106, at 649 (Mississippi statute vulnerable to constitutional attack). In the *French* case, Judge Reilly, in his concurrence, opined that the District of Columbia statute was unconstitutional solely on first amendment grounds. 365 A.2d at 625.

> The very concern of mortmain statutes is that a testator, in making a prohibited gift, is religiously motivated by hopes that his gift will help effect his own redemption. The donation of that gift, therefore, is precisely the practice of religious beliefs which the free exercise clause protects, and his expectation that the gift will so function is a protected interest.

NOTRE DAME LAW. Note, *supra* note 106, at 649.

[131] MISS. CODE ANN. § 91-5-31 (1972).

[132] NOTRE DAME LAW. Note, *supra* note 106, at 642.

[133] 375 So. 2d at 1009.

[134] *See* MISS. CODE ANN. § 91-5-25 (Supp. 1979) (permitting testator's spouse to renounce will's provisions and take one-half of testator's estate instead); 48 MISS. L.J. 145, 152-53 (1977). As aptly stated by one commentator: "Examine the logic of permitting a man to disinherit his children and parents by leaving everything to his mistress while prohibiting him from bequeathing more than one half his estate to a religious institution, university or library." E. CLARK, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS 198 (2d ed. 1971).

[135] MISS. CODE ANN. § 91-5-25 (Supp. 1979).

Furthermore, society's attitude toward these institutions has changed. When mortmain provisions were first enacted, the large institutions were feared. Today they are no longer feared; in fact, these entities receive preferential treatment with respect to taxes.[136]

If Mississippi were to repeal its mortmain provisions, the testator's family would still be protected through the normal procedure of proving undue influence.[137] The proscribed institutions would be placed in the same category as all other beneficiaries, requiring an identical showing of the lack of undue influence.[138] It is hoped that the inequities of the statute will move the Supreme Court of Mississippi to declare the mortmain provision unconstitutional,[139] or at least induce the legislature to repeal the statute[140] and the voters to repeal its constitutional counterpart.

B. *Adopted Child as Member of Beneficiary Class*

The adoption procedure was nonexistent at common law;[141] therefore, adoption exists in Mississippi solely as a creature of statute.[142] The right to adopt first appeared in Mississippi in 1857,[143] and the adoption statutes currently in effect were enacted in 1955.[144] Section 93-17-13 of the Mississippi Code determines[145] the effect on inheritance rights of an adoption which has become final. First, a child inherits from and through his adopting parents.[146] Second, a child inherits from the other children of the adopting parents as if those children were his natural brothers and sisters. Third, the adopting parents, brothers, and sisters can inherit from the adopted child. Under the statute, the rights of the natural parents are terminated; therefore, the statute prohibits natural parents from inheriting from their natural child who has been adopted. The statute vests in the adopted child, adopting parents, and adoptive kindred "all rights, powers, duties and obligations, respectively, as if such child had been born to the adopting parents in lawful wedlock."[147] It should be noted that the statute does not "restrict the right of any person to dispose of property under a last will and testament."[148]

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[136] *E.g., id.* § 27-7-29 (Supp. 1979).

[137] 48 MISS. L.J. 145, 153 (1977). *See* Note, *Confidential Relationships and Undue Influence in Wills in Mississippi,* 42 MISS. L.J. 146 (1971).

[138] MISS. L.J. Note, *supra* note 137, at 155-56.

[139] *See* text accompanying notes 116 through 132 *supra.*

[140] "States possessing such restrictive laws should repeal them, thus effecting uniform legislation—or, more accurately, a uniform lack of restrictive legislation." Committee on Succession, 5 REAL PROP. PROB. & TR. J. 290, 300 (1970).

[141] For a discussion of the history of adoption, see generally Huard, *The Law of Adoption: Ancient and Modern,* 9 VAND. L. REV. 743 (1956). 2 AM. JUR. 2d *Adoption* § 2, at 861 (1962) states:

> In this country the right or the power to create, by a legal proceeding, the relationship of parent and child between persons not so related by nature exists only by virtue of a statutory provision prescribing the conditions and the procedure by which adoption may be made effective. Not only the right of adoption but the legal consequences of adoption are of statutory origin.

[142] MISS. CODE ANN. §§ 93-17-1 to -31 (1972). In 1979, some new provisions were added. *Id.* §§ 93-17-51 to -67 (Supp. 1979).

[143] McFarlane, *The Mississippi Law on Adoptions,* 10 MISS. L.J. 239, 240 (1938) (citing MISS. REV. CODE c. 41, art. 41 (1857)).

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[144] *See* Robertshaw, *Mississippi's New Adoption Law,* 27 MISS. L.J. 32, 32 (1955).

[145] MISS. CODE ANN. § 93-17-13 (1972) provides in pertinent part:

> The final decree shall adjudicate, in addition to such other provisions as may be found by the court to be proper for the protection of the interests of the child; and its effect, unless otherwise specifically provided, shall be that (a) the child shall inherit from and through the adopting parents and shall likewise inherit from the other children of the adopting parents to the same extent and under the same conditions as provided for the inheritance between brothers and sisters of the full blood by the laws of the descent and distribution of the State of Mississippi, and that the adopting parents and their other children shall inherit from the child, just as if such child had been born to the adopting parents in lawful wedlock; (b) the child and the adopting parents and adoptive kindred are vested with all of the rights, powers, duties and obligations, respectively, as if such child had been born to the adopting parents in lawful wedlock, including all rights existing by virtue of section 11-7-13, Mississippi Code of 1972; provided, however, that inheritance by or from the adopted child shall be governed by subsection (a) above; (c) that the name of the child shall be changed if desired; and (d) that the natural parents and natural kindred of the child shall not inherit by or through the child except as to a natural parent who is the spouse of the adopting parent, and all parental rights of the natural parent, or parents, shall be terminated, except as to a natural parent who is the spouse of the adopting parent. Nothing in this chapter shall restrict the right of any person to dispose of property under a last will and testament.

[146] *Id.* This rule has not been interpreted. *See* notes 153 through 174 and accompanying text *infra.*

[147] MISS. CODE ANN. § 93-17-13 (1972).

[148] *Id.*

Two questions with respect to inheritance were left unanswered by this statute. First, the statute did not answer the question of whether an adopted child could still inherit from his natural parents. This question was answered by the Mississippi Supreme Court in the 1970 case of *Alack v. Phelps.*[149] In this case, where two adopted children sought recovery for the wrongful death of their natural father,[150] the Supreme Court held that since the statute did not expressly prohibit adopted children from inheriting from their natural parents, the legislative intent was to allow them to inherit.[151]

The second question as yet unanswered by the Mississippi statute is whether an adopted child can inherit from the collateral relatives of the adopting parent.[152] The statute states that the adopted child shall inherit "from and through" the adopting parents.[153] Literally, the phrase means the adopted child will inherit from and through the adopting parents whenever a natural child would take through representation.[154] However, the statute itself clouds the meaning of the phrase when it states that though an adopted child has all rights as if born in wedlock to the adopting parents, inheritance rights shall be governed by the rules in the statute.[155] If adopted children were on an equal footing with natural children under the statute, there would be no need for the exception. The Mississippi Supreme Court had an opportunity to clear up this confusion in the 1979 case of *Dodds v. Deposit Guaranty National Bank.*[156] Mrs. Bettye P. Dodds, a widow, executed her will on January 20, 1975, and created a testamentary trust provision.[157] The language of the trust included:

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[149] 230 So. 2d 789 (Miss. 1970).

[150] *Id.* at 790. The adoptive parents were the children's paternal grandparents. *Id.* at 791.

[151] *Id.* at 793. The court stated:

> Mississippi's adoption law does not state in any shape, form or fashion that the right of the child to inherit from its natural parents is terminated. We think the intent of the legislature is clear; they intended for the child to continue to inherit from his or her natural parents.

Id.

[152] Robertshaw, *supra* note 144, at 39, noted this problem as early as 1955: "Provisions for inheritance may or may not let an adopted child's rights approximate those of a natural child depending upon the interpretation of the law." *Id.* This question was answered under the pre-1955 adoption laws in Reeves v. Lowe, 213 Miss. 152, 56 So. 2d 475 (1952). There the court held that an adopted child could not inherit from her adopting parent's sister because the adoption decree did not provide for such inheritance rights. *Id.* at 164, 56 So. 2d at 479. The old statute did not confer "any property or inheritability rights whatever upon the adopted child." *Id.* at 156, 56 So. 2d at 476. *See* 55 IOWA L. REV. 739, 739-40 (1970) (discussing adopted child's right of inheritance from intestate natural parents). Where there is no "statutory direction on the point, it is the usual holding that the child continues to have the right to inherit from natural parents even though the statutes purport to sever all rights, liabilities and obligations which exist between child and parents." E. CLARK, L. LUSKY & A. MURPHY, *supra* note 134, at 101 n.1. *Compare In re* Estate of Wulf, 184 Neb. 314, 167 N.W.2d 181, 181 (1969) (adopted child could inherit from natural parents) *and In re* Estate of Tilliski, 390 Ill. 273, 61 N.E.2d 24, 29 (1945) (same) *with* Waites v. Curators of Cent. College, 363 Mo. 932, 254 S.W.2d 645, 650 (1953) (adopted child could not inherit from natural grandparents).

[153] MISS. CODE ANN. § 93-17-13 (1972).

> The Trustee shall hold the above property in trust for the use and benefit of my son, . . . *and his children* . . . for the support and maintenance and education of his children, . . . and shall distribute all of the property in the trust to the descendants of my son, . . . per stirpes, . . . for *his* or *her* benefit.[158]

Edwin Dodds was the only son of Bettye, Bettye having adopted him in 1942.[159] Edwin married Carol Smith in 1959, and they had two natural children, both girls. Edwin and Carol were separated in 1974 and filed for divorce on January 21, 1975, the day after Mrs. Dodds executed her will. Bettye Dodds died on November 22, 1975. On February 26, 1976, Edwin married Emma Jane Lambert and subsequently adopted her son by a previous marriage. The lower court held that the adopted son would inherit under Mrs. Dodd's trust along with Edwin's natural daughters.[160] The supreme court affirmed the trial court's holding.[161]

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[154] J. BUNKLEY & W. MORSE, *supra* note 69, at 254. "It would seem that under the new adoption statute no effect will be given to the words 'and through the adopting parents' unless an adopted child can inherit from collateral relatives of the adopting parents." *Id.*

[155] MISS. CODE ANN. § 93-17-13 (1972). The persons who were instrumental in having the exception to the statute passed agreed "that the adopting parties had no right to make the adopted child the heir of his brothers, sisters, nieces, nephews, etc., in a proceeding to which these collateral relatives were not parties, and to which they did not consent." Robertshaw, *supra* note 144, at 36.

[156] 371 So. 2d 878 (Miss. 1979).

[157] *Id.* at 879.

[158] *Id.* (court's emphasis).

[159] *Id.*

[160] *Id.* at 881.

In reaching its decision, the supreme court did not answer the question of whether an adopted child inherits from collateral relatives of the adopting parents. At one point it seemed the court would adopt this position when it stated that the intent of the legislature in passing the statute was to put the adopted child on an equal basis with natural children.[162] The implication of this statement is that the adopted child is entitled to inherit from all relatives on an equal basis with natural children. The court, however, did not expressly adopt this position.[163] Instead, the court retreated from the "equal basis" statement,[164] and decided the case on the theory that the adopted son was a descendant of the father, thus taking his share of the trust from Edwin, not Mrs. Dodds.[165] The court also looked to the intent of the testator,[166] and found that Mrs. Dodds' intention was not to limit the trust to the natural children. The court gave several reasons for its conclusion: (1) the natural children were girls and she used the language his or her; (2) she knew Edwin and his first wife were separated, thus, the possibility of his remarrying was increased; and (3) she was aware of the adoption laws since she had adopted Edwin.[167] Since the issue of whether the statute allows an adopted child to inherit from collateral relatives was addressed in the case,[168] the court should have taken the opportunity to provide some guidance in this area. Of course, if the legislature were to amend the statute and eliminate the confusion in this area,[169] it would solve the problem of the supreme court's having to second guess the legislative intent of the statute. The policy toward adoption is generally to transplant the child into the adopted family.[170] To achieve this purpose, the child should be permitted to inherit from collateral relatives, thereby allowing inheritance as it concerns the adopted child to be governed by the general rules of descent and distribution in Mississippi.[171]

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[161] *Id.* at 882.

[162] *Id.* at 881.

[163] *Id.* The court instead limited the equal basis treatment to inheritance from adopting parents and other children of such parents: "We are unable to discern any such intention but rather conclude the legislature intended to elevate an adopted child to the same status in law as a natural child *for inheritance from the adopting parents and their children." Id.* (emphasis added).

[164] *See* J. BUNKLEY & W. MORSE, *supra* note 69, § 12.16, at 57 n.18 (1980 Supp.).

[165] 371 So. 2d at 881-82.

[166] *Id.* at 882. *See generally* 40 TENN. L. REV. 134, 139 (1972) (contending court should construe wills to include adopted children unless the will provides otherwise).

[167] 371 So. 2d at 882.

[168] *Id.* at 880-81.

[169] *See generally* Corcoran, *The Problem of Descent and Distribution: A Need for Legislation,* 45 ILL. B.J. 634, 642 (1957).

VI. CONCLUSION

Many of the decisions covered in this comment have little significance beyond maintaining consistency in the courts. Nevertheless, the 1979 Mississippi Supreme Court did address and create some troublesome legal issues. While inconsistency, or perhaps equity jurisprudence, produced confusion in the law of contracts,[172] the progressive outlook suggested in the areas of adopted children's rights[173] and child support[174] may well provide a springboard for greater judicial awareness. The court succeeded in circumventing the antiquated and arguably unconstitutional mortmain provisions[175] of Mississippi law. Perhaps the anti-mortmain decision will provide the impetus necessary to remove that old thorn from Mississippi's body of law.

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[170] *See generally* Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and A Proposal for Model Legislation,* 51 CORNELL L.Q. 152, 159-60, 165 (1966). To carry out the policy of transplanting the child into the adopting family, the case of Alack v. Phelps, 230 So. 2d 789 (Miss. 1970), should not be followed. *See* notes 149 through 151 and accompanying text *supra.* By allowing the child inheritance rights from his natural parents, the ties are not severed. Furthermore, the possibility of double inheritance arises when the child is allowed to inherit from both sets of parents. To avoid these problems, the statute should be amended to deny the child inheritance rights from the natural parents.

[171] The general rules of descent and distribution are found in MISS. CODE ANN. § 91-1-3 (1972).

[172] *See* notes 6 through 53 and accompanying text *supra.*

[173] *See* notes 141 through 170 and accompanying text *supra.*

[174] *See* notes 56 through 90 and accompanying text *supra.*

[175] *See* notes 125 through 140 and accompanying text *supra.*

PROPERTY

During 1979 the Mississippi Supreme Court decided at least twenty-seven cases which involved property law. Most of these were fairly straightforward applications of established law to the facts of the particular case.[1] These cases do not merit detailed attention. The primary purpose of this section is to analyze only a few of the more important cases handed down during the year.[2] There are several attributes of a case that make it worthy of detailed textual treatment. A case may change or extend prior law, establish or reaffirm law for Mississippi different from that of other states, establish new law, or the court may issue a weak opinion. Several 1979 cases fall within these classifications. Each of the following sections interprets a single case or statute in detail.

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[1] *See* Mississippi State Highway Comm'n v. St. Catherine Gravel Co., 380 So. 2d 231, 233 (Miss. 1979) (eminent domain compensation does not include lost profits if proof is speculative or uncertain); Swales v. Swales, 378 So. 2d 215, 217 (Miss. 1979) (where wife fails to join conveyance of homestead, the conveyance is void, but wife must pay value of improvements made by good faith occupant); Rains v. Teague, 377 So. 2d 924, 927 (Miss. 1979) (owner bears burden on tax assessments); Bailey v. Vaughn, 375 So. 2d 1054, 1058-59 (Miss. 1979) (partition by sale, less favored than partition in kind, must be supported by substantial reasons); Cole v. Burleson, 375 So. 2d 1046, 1047-48 (Miss. 1979) (not required that fence remain standing for adverse possession claim to ripen into title); Smith v. Smith, 375 So. 2d 1041, 1042-43 (Miss. 1979) (5-3 decision) (express covenant to maintain premises must yield to exculpatory clause in shopping center lease if contract unaffected by public interest); Mississippi State Highway Comm'n v. Daughtrey-Hughes, Inc., 375 So. 2d 413, 414 (Miss. 1979) (compensation in eminent domain proceeding where leasehold interests are present requires unit valuation and not before-and-after method); Hathorn v. Illinois Cent. Gulf R.R., 374 So. 2d 813, 814-16 (Miss. 1979) (reverter provision prohibiting abandonment of depot not breached by railroad's operating in a small building a few feet from old depot); Perrien v. Mapp, 374 So. 2d 794, 796 (Miss. 1979) (where neither party was mistaken, proponent must prove fraudulent conduct on the part of the other to establish mutual mistake sufficient for reformation in a boundary dispute); Hardy v. Wheaton, 374 So. 2d 790, 791 (Miss. 1979) (defense of laches not available where applicable statute of limitations had not run); Gibson v. State Land Comm'r, 374 So. 2d 212, 216 (Miss. 1979) (since statutes of limitations in civil causes do not run against the state, one may not adversely possess land against the sovereign); Payne v. Touchstone, 372 So. 2d 1277, 1280 (Miss. 1979) (upper landowner entitled to an injunction ordering lower landowner to remove a wall since upper landowner's improvements did not impede the surface water's natural flow); State v. Hanson Properties, Inc., 371 So. 2d 871, 872 (Miss. 1979) ("Lowry Island Lands" may be acquired from state only through compliance with statutes and not by adverse possession, sale by Land Commissioner without authority, or by court decree prior to exhaustion of administrative remedies); McAdory v. American Empire Life Ins. Co., 370 So. 2d 919, 920 (Miss. 1979) (execution on real estate permanently enjoined because of fraudulent land transfers and a usurious note); Berry v. United Gas Pipe Line Co., 370 So. 2d 235, 236-37 (Miss. 1979) (value of condemned land does not include improvements made before condemnation proceedings are instituted by a party having the power of eminent domain); Damson Oil Co. v. Southeastern Oil Co., 370 So. 2d 225, 228-29 (Miss. 1979) (Oil and Gas Board properly cancelled plaintiff's drilling permit for failure to comply with notice and hearing requirements; granting of defendant's permit to pool and drill was in accordance with substantial evidence test and protected coequal and correlative rights); Builders Supply Co. v. Pine Belt Sav. & Loan Ass'n, 369 So. 2d 743, 745

I. POSSIBILITIES OF REVERTER

Occasionally, among courts recognizing the distinction in function between the legislative and judicial branches of government, a court will speak directly to the legislature urging some action or pointing out an area which it believes deserves legislative attention. Last year in Mississippi, in the case of *City of Laurel v. Powers,*[3] the supreme court urged the legislature to subject possibilities of reverter to the rule against perpetuities by legislative action.[4]

The case was straightforward. Powers had conveyed a lot to the city of Laurel for use exclusively as a parking lot, with a reversion clause should the lot ever be used for any other pur-

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(Miss. 1979) (a junior mortgagee is entitled to any surplus from the foreclosure sale of a senior mortgagee); Gresham v. Mississippi State Highway Comm'n, 368 So. 2d 826, 827 (Miss. 1979) (defendant's attorney's fees are not recoverable in eminent domain suit if petitioner pays judgment within ninety days of affirmance of final judgment on appeal); Banks v. Banks, 367 So. 2d 1364, 1365 (Miss. 1979) (joinder of life tenant and remainderman is equivalent to indefeasible fee simple title required to institute suit for partition); Glover v. Glover, 367 So. 2d 167, 178 (Miss. 1979) (chancellor's decision to set aside deed between close relatives for undue influence was against the great weight of evidence); Kynerd v. City of Meridian, 366 So. 2d 1088, 1088 (Miss. 1979) (hardship exception may not be granted where consent of all owners of adjacent property is not obtained as required by zoning ordinance).

[2] *See, e.g.*, Clement v. R.L. Burns Corp., 373 So. 2d 790 (Miss. 1979) (oil and gas); Mississippi Valley Title Ins. Co. v. Horne Constr. Co., 372 So. 2d 1270 (Miss. 1979) (deficiency judgment after mortgage foreclosure); Pongetti v. Bankers Trust Sav. & Loan Ass'n, 368 So. 2d 819 (Miss. 1979) (doctrine of inverse order of alienation); City of Laurel v. Powers, 366 So. 2d 1079 (Miss. 1979) (possibilities of reverter). In addition, the Mississippi Surface Coal Mining and Reclamation Act, MISS. CODE ANN. §§ 53-7-5 to -75, 53-9-1 to -91 (Supp. 1979), is analyzed.

[3] 366 So. 2d 1079 (Miss. 1979).

[4] *Id.* at 1082.

pose.[5] In 1973 the city conveyed part of the property to the Laurel Urban Renewal Agency (LURA) for use as a street, and Powers sued for inverse condemnation.[6] The trial court awarded Powers damages for the conveyed part of the property, severance damages for the remainder of the lot, the value of improvements on the conveyed portion, plus interest and attorney's fees.[7] The supreme court affirmed the lower court's holdings except with regard to severance damages.[8] Quoting extensively from a prior case, *Hemphill v. Mississippi State Highway Commission*,[9] the court reaffirmed Mississippi's minority position on the issue of whether the owner of a contingent future interest is entitled to an award in a condemnation proceeding.[10] The court stated that this issue was to be determined on a case by case basis according to whether or not the interest is "of a sufficiently substantial character."[11] In the case at bar, the court concluded

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[5] The deed contained the following language:

> This conveyance is made in order that the grantee may establish thereon a public parking lot and is made only for so long as the property conveyed is used for a public parking lot, and if, at any time, it shall cease to be used for such purpose, title shall automatically and immediately revert to the grantor, his heirs, successors or assigns.

Id. at 1080.

[6] The complainants alleged that the result would be reconveyance to the city, thereby enabling the city to accomplish indirectly what it could not do directly; that is, inversely condemn the property for uses which would otherwise defeat the city's title. *Id.*

[7] *Id.* at 1081. The trial court awarded:

Damages for conveyed portion	$14,690.00
Severance damages	7,836.00
Value of improvements on conveyed part	1,305.00
Attorney's fees	3,000.00
Interest to date of decree	5,004.51
Total	$31,835.51

[8] *Id.* at 1084.

[9] 245 Miss. 33, 145 So. 2d 455 (1962).

[10] 366 So. 2d at 1084 (quoting Hemphill v. Mississippi State Highway Comm'n, 245 Miss. at 49-51, 145 So. 2d at 462-63, where the court declined to follow the majority position that compensation is not allowable for condemnation to the owners of these future interests). *See generally* 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 119, at 516-20 (2d ed. 1953).

[11] 366 So. 2d at 1084 (quoting Hemphill v. Mississippi State Highway Comm'n, 245 Miss. at 51, 145 So. 2d at 463). The court apparently followed the *Restatement* which states that only if a reversion is probable within a reasonably short period of time may the holder of the future interest be entitled to share the condemnation award with the holders of other interests. 1 RESTATEMENT OF PROPERTY § 53, Comments b, c & d, at 186-

that the interest held by Powers in the remaining part of the lot was not sufficiently substantial and that severance damages were therefore inappropriate.[12]

The *Powers* case is most important for its plea to the legislature for a change in Mississippi's law regarding the possibility of reverter.[13] In Mississippi and in most other states, possibilities of reverter are not subject to the rule against perpetuities,[14] the result being that unexpected reversions can occur many decades after the possibility was created, causing great confusion and hardship among landowners.[15] In the instant case the supreme court quoted from a well-researched footnote in an Oregon case[16] which indicated that some limitation should be placed on possibilities of reverter and rights of re-entry, and that imposition of the rule against perpetuities was the simplest means to this end. Disagreement exists among states and commentators

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90 (1936). Although the facts presented in the instant case do not specifically mesh with the conditions set forth in the *Restatement,* the rule, in some form, must have been implicitly adopted by the court. A specific enunciation of this fact would have been helpful to practitioners.

[12] 366 So. 2d at 1084.

[13] *Id.* at 1082. The court stated:

> We do not treat [the question of whether the rule against perpetuities applies to possibilities of reverter] further because it is not necessary for the case, but take this method of calling the legislature's attention to this question for possible action by it to subject possibilities of reverter to the rule against perpetuities.

Id.

[14] *See* St. Regis Pulp & Paper Corp. v. Floyd, 238 So. 2d 740, 741-43 (Miss. 1970) (where 1903 deed had reverter clause which was sued upon in 1967 after 13 transfers of either title or timber, the land was held to have reverted); Jones v. Burns, 221 Miss. 833, 835, 841, 74 So. 2d 866, 867, 868 (1954) (deed recited that land was to be used for a school). *See generally* VI AMERICAN LAW OF PROPERTY § 24.62, at 150 (Casner ed. 1952); J. GRAY, THE RULE AGAINST PERPETUITIES § 41, at 46 (4th ed. 1942); J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 211 (2d ed. 1962); 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1238-39, at 144-48 (2d ed. 1956); 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 404, at 167 (3d ed. 1939).

[15] *See* Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E.2d 924 (1950) (reverter clause of an 1849 devise took effect in 1939 forcing sale of the land and partition of the proceeds among over 100 far-flung legatees); St. Regis Pulp & Paper Corp. v. Floyd, 238 So. 2d 740, 741 (Miss. 1970) (after 13 transfers of either title or timber over a period of 63 years, land was held to have reverted).

[16] 366 So. 2d at 1082 (citing City of Klamath Falls v. Bell, 7 Or. App. 330, 490 P.2d 515, 518 n.3 (1971)).

about preferable changes to the rule against perpetuities,[17] but virtual unanimity prevails that possibilities of reverter and rights of re-entry should either be subject to the rule against perpetuities or be limited in some other way.[18] These future interests are now subject to the rule in England,[19] and many states have restricted by statute their operation in some significant manner.[20] As the law now stands in Mississippi, these future interests may cause great hardship to the unwary, prevent the full use and enjoyment of land, and erode the confidence of the people in the essential fairness of our legal system. Moreover, no countervailing arguments in favor of their present operation are convincing.[21]

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[17] *See generally* Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. Pa. L. Rev. 1124 (1960) (exploring various viewpoints in the country concerning the viability of the rule).

[18] *See* VI American Law of Property § 24.62, at 153-57 (Casner ed. 1952) (exemption cannot be justified); J. Dukeminier, Perpetuities Law in Action, Kentucky Case Law and the 1960 Reform Act 96-113 (1962) (such interests should be temporarily extinguished at some point); J. Morris & W. Leach, *supra* note 14, at 209-18 (reverters should be subject to rule); B. Rubenstein, Introduction to Perpetuities 30 (1959) (exemption is illogical); L. Simes, Handbook of the Law of Future Interests 280-81 (2d ed. 1966) (these interests are as objectionable as others which the rule strikes down); Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land,* 31 Fordham L. Rev. 303, 320-22 (1962) (these interests should be limited); Cook, *Rights of Entry, Possibilities of Reverter, Resulting Trusts and the Rule Against Perpetuities,* 15 Temp. L.Q. 509, 511, 521-24 (1941) (problems are caused by the failure to apply the rule); Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests,* 1972 Duke L.J. 517, 529 (many states have enacted legislation to destroy these future interests after a stipulated period); Leach, *Perpetuities: The Nutshell Revisited,* 78 Harv. L. Rev. 973, 980 (1965) (failure to apply the rule to these interests produces "appalling practical results"); Leach, *Perpetuities in Perspective: Ending in Rule's Reign of Terror,* 65 Harv. L. Rev. 721, 739-49 (1952) (great evil is done by excluding rights of re-entry and possibilities of reverter from the rule's operation); Leach, *supra* note 17, at 1133-42 (something should be done to limit the operation of these interests); Lynn & Ramser, *Applying the Rule Against Perpetuities to Functional Equivalents: Copps Chapel and the Woburn Church Revisited,* 43 Iowa L. Rev. 36, 53-56 (1957) (the rule should apply to these interests); Comment, *Proposed Restrictions on Possibilities of Reverter and Rights of Entry,* 34 Miss. L.J. 176, 190-91 (1963) (these interests should be subjected to the rule against perpetuities).

[19] L. Simes, *supra* note 18, at 280 n.9. The author explained that:

> In England, even without a statute the power of termination was regarded as subject to the rule. See In re Hollis' Hospital, [1899] 2 ch. 540; In re Da Costa [1912] 1 ch. 337. Under the English Perpetuities and Accumulations Act of 1964, the rule is recognized as applying to possibilites of reverter, resulting trusts, and powers of termination.

[20] *See, e.g.,* Ariz. Rev. Stat. Ann. § 33-436 (1956) (future interests enforceable only when they result in actual and substantial benefit to holder of interest); Conn. Gen. Stat. Ann. § 45-97 (West 1960) (30 year limit); Fla. Stat. Ann. § 689.18 (West Supp. 1979) (21 year limit); Ill. Ann. Stat. ch. 30, § 37e (Smith-Hurd 1969) (40 year limit); Iowa Code Ann. § 614.24 (West Supp. 1979-1980) (interest void unless re-recorded every 21 years); Ky. Rev. Stat. §§ 381.218-.223 (1970) (makes possibility of reverter a right of entry and puts 30 year limit on rights of entry); Me. Rev. Stat. Ann. tit. 33, §§ 103-06

While it is beyond the scope of this comment to explore the various ways of reforming the rule against perpetuities or subjecting possibilities of reverter and rights of re-entry to the rule, it should be recognized that the supreme court is correct in suggesting that legislative action should be taken to limit the harmful effects possible under the present state of the law in Mississippi.

II. OIL AND GAS

One of the most interesting cases decided by the Mississippi Supreme Court last year was *Clement v. R. L. Burns Corp.*[22] In a relatively short opinion the court disposed of four major issues involving (1) fraud in a tax sale, (2) the passage of mineral estates under a tax sale, (3) adverse possession of minerals, and (4) laches.

In *Clement*, Colonel Henry Hill had sold the land in question in 1921, reserving the oil and gas. In 1954, J. Edward Seitz became the owner of the land, and later that year the land was sold for taxes to his daughter, Mrs. Roy N. Martin. In 1958, after a tax deed had been issued, Mrs. Martin brought suit to confirm title, and a final decree was entered in her favor.[23] In 1974, the R. L. Burns Corporation, as lessee, began development of

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(1964) (30 year limit); MD. REAL PROP. CODE ANN. §§ 6-101 to -105 (1974) (30 year limit); MASS GEN. LAWS ANN. ch. 184A, § 3 (West 1977) (30 year limit); MICH. COMP. LAWS ANN. § 554.46 (1967) (to be enforceable, interest must be of actual or substantial benefit to owner, 30 year limit); MINN. STAT. ANN. § 500.20(2) (West 1947) (30 year limit); NEB. REV. STAT. §§ 76-2,100 to -2,105 (1976) (30 year limit); N.Y. REAL PROP. LAW § 345 (McKinney 1968) (30 year limit unless re-recorded every 10 years thereafter); OHIO REV. CODE ANN. § 5301.48-.56 (Page 1970) (interest void after 40 years unless re-recorded every 40 years thereafter); R.I. GEN. LAWS §§ 34-4-19 to -20 (1969) (20 year limit); WIS. STAT. ANN. § 700.15 (West 1978 Special Pamphlet) (interest not enforceable unless of actual or substantial benefit to owner of interest).

[21] *See generally* note 18 *supra*.

[22] 373 So. 2d 790 (Miss. 1979).

[23] *Id.* at 792.

the property for oil and gas, spending millions of dollars on a project which resulted in a well on the land producing natural gas and condensate.[24] At about the time that Burns began development, the 1921 reservation by Hill was noticed, and as a result there was a "monumental undertaking to locate those claiming under or through him, which resulted in phenomenal success."[25] Suit was then brought on the basis of the 1921 reservation.[26]

The supreme court held that the tax sale was effective to pass title to the mineral estate, as well as the surface estate, even though the minerals had been reserved many years earlier.[27] This was the correct application of Mississippi law. A series of statutes passed in 1946 exempts nonproducing mineral interests from taxation and the effects of a tax sale of the surface.[28] However, these statutes apply only to mineral interests created after 1946. The owners of mineral interests created before 1946 are obligated to purchase mineral documentary stamps in order to gain this exemption.[29] Owners of mineral estates that were created prior to 1946 for which no documentary stamps have been purchased are bound by pre-1946 law, which uniformly holds that a mineral estate can be separately assessed for taxes and that if not so assessed the mineral estate will pass with the surface at a tax sale.[30] Any person involved with severed mineral estates in Mississippi should take note of the requirement.[31]

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[24] *Id.* at 793.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 794.

[28] 1946 Miss. Laws ch. 409 (current version at MISS. CODE ANN. §§ 27-31-71 to -87 (1972)).

[29] MISS. CODE ANN. §§ 27-31-73, -75 (1972) (application for exemption of existing interests).

[30] Mineral reservations created prior to 1946 are assessed under *id.* §§ 27-35-23, -51. *See, e.g.,* Pettis v. Brown, 203 Miss. 292, 294, 33 So. 2d 809, 809 (1948) (tax sale of land carries mineral estate where mineral estate was created prior to 1946 and minerals were not separately assessed); Stern v. Parker, 200 Miss. 27, 41-42, 27 So. 2d 402, 402-03 (1946) (tax sale and deed operate to convey all estates in land not separately assessed). *See also* Gray v. Steelman, 243 Miss. 294, 297-99, 137 So. 2d 797, 798-99 (1962) (summary and history of this area of law in Mississippi before and after 1946).

[31] Other separate estates may also be lost in tax sales. *See, e.g.,* City of Jackson v. Ashley, 189 Miss. 818, 825, 199 So. 91, 93 (1940) (single assessment and tax sale extinguished building limitations); Reliance Inv. Co. v. Johnson, 188 Miss. 227, 236, 194 So.

The court also held that the complainants had failed to prove fraud in the tax sale by clear and convincing proof or, alternatively, that a redemption had taken place.[32] Although the circumstances of the tax sale were very peculiar,[33] the court's holding was in accord with the treatment usually given lower court findings of fact by appellate courts.

The third holding in the case was that even if Mrs. Martin had not acquired title by a valid tax deed, she had acquired title to both the mineral and surface estate by adverse possession.[34] This result was reached by extension of the principles involved in the holding that the tax deed was effective to pass title to the severed mineral estate. The court's rationale was based on the premise that the tax sale operated to merge all estates in the land, putting Mrs. Martin in the position of one who adversely possessed under color of title against a record owner of both the surface and mineral estate in the land.[35] Had this been an issue of first impression for the court, the holding would clearly be consistent with *Stern v. Parker*[36] and the earlier holding that a tax deed is effective to carry severed mineral rights. However, the court has decided this issue to the contrary twice in the last twenty-five years.[37] The unfortunate result of this situation is

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749, 749 (1940) (all former rights are extinguished by tax sale); Eureka Lumber Co. v. Terrell, 48 So. 628, 628 (Miss. 1909) (title to land and timber passed since there was no separate assessment of timber); Hazlip v. Nunnery, 29 So. 821, 821-22 (Miss. 1901) (tax deed carries contingent remainder); Lenoir v. Bridges, 2 Miss. Dec. 554, 561 (1881) (life estate goes with tax deed).

[32] 373 So. 2d at 795-96. *See* Hamilton v. McGill, 352 So. 2d 825, 831 (Miss. 1977) (fraud never presumed, but must be proved by clear and convincing evidence).

[33] The tax sale records and checks introduced into evidence were construed by appellants to evince a redemption and not a purchase by tax sale. 373 So. 2d at 796.

[34] *Id.* at 797.

[35] It is the recognized rule in Mississippi and other states that adverse possession of the surface, when there has been no separate mineral estate created, will give title to both the surface and the mineral estate. *See generally* Turner Lumber Co. v. Beckham, 277 So. 2d 110, 112 (Miss. 1972) (invalid tax deed held to constitute color of title for adverse possession of minerals); R. HEMMINGWAY, OIL AND GAS § 3.4 (B) (1971) (application of rule in different states).

[36] 200 Miss. 27, 41-42, 27 So. 2d 402, 402-03 (1946) (tax sale and deed operate to convey a severed mineral interest not separately assessed).

[37] Turner Lumber Co. v. Beckham, 277 So. 2d 110, 112-14 (Miss. 1972); White v. Merchants & Planters Bank, 229 Miss. 35, 47-51, 90 So. 2d 11, 14-16 (1956). In *Turner* there was a tax sale and deed; the record owner of the severed mineral estate claimed,

that the law in this area is now uncertain in Mississippi. While the instant case represents the most recent holding of the supreme court, it is also an alternative holding and could, therefore, be considered dictum. It would have been very helpful if the court had expressly dealt with the precedent which it did not follow.

Finally, the court stated that due to the long delay by complainants, the loss of records, memories, and participants, and the enormous amount of money already spent in development, the complainants were guilty of laches and that this alone might be sufficient to bar their relief.[38] The record clearly shows this to be true, and this is the strongest point of the case. It might well have been better to decide this case on laches than to confuse the Mississippi case law surrounding adverse possession of mineral interests.

In summary, the *Clement* decision is significant for two reasons. First, because of conflicting precedents, it should not be relied upon absolutely for the proposition that minerals may be contructively possessed under color of a tax title. Second, it should serve as a warning to the owners of severed mineral interests that it is possible to lose that interest through inaction.

III. Doctrine of Inverse Order of Alienation

Pongetti v. Bankers Trust Savings & Loan Association[39]

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because the tax deed was void, that the holder of the tax deed could not assert adverse possession of the mineral estate. The court held that the tax purchaser had gained title to the minerals by adverse possession, but emphasized the fact that the mineral estate was created after adverse possession had begun. 277 So. 2d at 112, 114. Further, the court found that a void tax deed gives color of title like any other color of title. *Id.* at 115. In *White* the lower court had reasoned "that if the tax sale had been valid, there would have been a merger of both the surface and the minerals; that, although void, the deed did sufficiently describe the land, and amounted to color of title . . . ." 229 Miss. at 47, 90 So. 2d at 14 (1956) (citations omitted). This is precisely the holding of the supreme court in the instant case. In *White,* however, the supreme court reversed the lower court and held that a severed mineral estate may not be constructively adversely possessed under color of a tax deed. *Id.* at 51, 90 So. 2d at 16. These two cases are consistent with the general rule in Mississippi absent a tax sale. *See, e.g.*, Moffett v. International Paper Co., 243 Miss. 562, 566, 139 So. 2d 655, 656 (1962) (minerals may not be constructively adversely possessed if severed prior to the start of adverse possession).

[38] 373 So. 2d at 797.

[39] 368 So. 2d 819 (Miss. 1979).

was an extremely complicated case factually. In addition, the supreme court's opinion was unnecessarily confusing.

The following events, in chronological order, are essential to an understanding of the case. Miller, owning two pieces of land, Tracts I and II, gave a single deed of trust on them to Bankers Trust. He subsequently mortgaged Tract I to Sims, then sold Tract II, which eventually became owned by Anderson, and later sold Tract I to Miller Construction Company. Finally, Tract II was mortgaged by Anderson to Howell.[40] At some point Mississippi Valley Title Insurance Company insured Anderson's title to Tract II for the amount of the Howell deed of trust.[41] Neither Anderson, Howell, nor Mississippi Valley was aware of the senior mortgage held by Bankers Trust.[42] Upon learning of Bankers Trust's senior mortgage, Mississippi Valley bought the mortgage, released Tract II without consideration, and began foreclosure on Tract I.[43] Sims, the holder of the junior mortgage on Tract I, filed a bill of complaint seeking to enjoin Mississippi Valley from foreclosing on Tract I and asking the court to order foreclosure with the proceeds being applied first to satisfy his deed of trust.[44] The chancellor, applying the doctrine of marshalling of assets "to a limited extent," found that Tract II, exclusive of improvements, was worth $40,000. He then deducted $40,000 from the deed of trust held by Mississippi Valley, declared a sale of Tract I, and applied the proceeds of the sale to what remained of the mortgage held by Mississippi Valley.[45] The practical effect of this action was to leave Sims without security since Tract I sold for approximately the same amount as the remaining portion of the Mississippi Valley mortgage.[46] There is no explanation in the supreme court's opinion of what "to a limited extent" means nor why the chancellor failed to include the value of improvements on Tract II in his valuation of Tract II.

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[40] *Id.* at 820-21.

[41] The opinion states that the insurance covered liens existing as of July 16, 1972. *Id.* at 821. Since the Howell mortgage was dated May 15, 1973, and since the insurance, being of the same amount, was obviously acquired at the request of the mortgagee, the policy must have been issued after May 15, 1973. It is incongruous that this insurance policy would not cover liens up to the date of its issuance. The incongruity is explained by the lower court's opinion which states that the policy was issued on July 16, 1973. Sims v. Bankers Trust Sav. & Loan, No. 24, 450 (Ch. Lee County April 19, 1976). Apparently the supreme court's opinion should have stated 1973 instead of 1972 as the effective date of the policy.

[42] 368 So. 2d at 821.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 822.

Marshalling of assets includes two doctrines: the two-funds doctrine and the doctrine of inverse order of alienation.[47] Under the doctrine of inverse order of alienation, when several pieces of land are covered by one mortgage, and these pieces are sold successively, the mortgagee in foreclosing must proceed against the pieces successively, starting with any still held by the mortgagor, moving thence to the last piece sold, and reaching the first piece sold only if all others combined do not satisfy his mortgage.[48] This doctrine also applies when the pieces of land are subsequently encumbered.[49] The two-funds doctrine applies where two or more pieces of land are covered by a single mortgage, and one of them is also covered by a junior mortgage. By logical extension and with additional, more powerful justifications, the two-funds doctrine operates to require the senior mortgagee to proceed against the piece(s) unburdened by a junior mortgage before looking to the piece having a junior mortgagee.[50] Al-

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[46] *Id.*

[47] G. Osborne, Handbook on the Law of Mortgages § 286, at 580 (2d ed. 1970).

[48] *Id.* § 287, at 584.

[49] When a junior mortgage on one tract is acquired before sale of the second tract, the tract sold must be foreclosed upon first by the senior mortgagee of both tracts. Millsaps v. Bond, 64 Miss. 453, 456, 1 So. 506, 507 (1887). *See generally* Annot., 131 A.L.R. 4, 52-58 (1941) (applicability of doctrine of inverse order of alienation where some parcels are alienated and some are encumbered).

[50] The theoretical basis for the doctrine of inverse order of alienation is that when the mortgagor of a tract of land sells a piece of that tract, he impliedly agrees with his grantee that the land he still holds will be primarily liable for his own debt. Recognizing this rationale, all states support this application of the doctrine. Annot., *supra* note 49, at 52-58.

When the mortgagor sells the remaining land the justification for the doctrine is that the second grantee steps into the shoes of his grantor. G. Osborne, *supra* note 47, § 287, at 583 n.66. Opposing this rationale is the argument that there is no equity in favor of either the first or second grantee and that, as between them, one should not be required to bear the whole burden. Annot., *supra* note 49, at 7. At least two states subscribe to this latter rationale and do not apply the doctrine under those circumstances. *See* Huff v. Farwell, 67 Iowa 298, 301, 25 N.W. 252, 253 (1885) (parcels not liable in inverse order of alienation, but are chargeable pro rata); Bronaugh v. Burley Tobacco Co., 212 Ky. 680, 684, 280 S.W. 97, 98 (1926) (rule of inverse order of alienation does not apply in Kentucky). *See generally* G. Osborne, *supra* note 47, § 287, at 584-86. In addithough the two-funds doctrine has more powerful justifications, it operates as of the time of its invocation,[51] whereas the doctrine of inverse order of alienation is a fixed right attaching at the time of alienation.[52] For this reason, when the two doctrines conflict the doctrine of inverse order of alienation controls.[53] Thus, where two pieces of land are covered by one mortgage, and the mortgagor first sells one, then mortgages the other, the senior mortgagee must proceed against the piece with a junior mortgage before reaching the piece first sold.[54]

The supreme court stated that the doctrine of inverse order of alienation should be applied[55] in this case; since Tract I had been mortgaged to the junior mortgagee before Tract II was sold,[56] the senior mortgagee should have proceeded against Tract II before Tract I.[57] The court, holding that as to Sims the Mississippi Valley mortgage was extinguished by the value of Tract II,[58] stated that the confirmation decree of the foreclosure on Tract I would be affirmed if Mississippi Valley paid Sims the value of his junior mortgage within thirty days.[59] Furthermore, the court stated that if this was not done it would set aside the sale and order the foreclosure of the Sims' deed of trust, with proceeds to be distributed in the following order: (1) expense of foreclosure, (2) payment of the Sims deed of trust, (3) payment of the Mississippi Valley deed of trust, and (4) the balance to

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tion to the above principles, the two-funds doctrine incorporates the equitable principle that where the senior mortgagee can satisfy his debt from either of two funds and the junior mortgagee from only one, the senior mortgagee should not needlessly impair the junior mortgagee's security when to act otherwise would not prejudice his rights. G. OSBORNE, *supra* note 47, § 286, at 580.

[51] Annot., *supra* note 49, at 6.

[52] *Id.*

[53] *See, e.g.*, Hunt v. Ewing, 80 Tenn. 519, 521 (1883) (as between two parcels covered by a senior mortgage, the piece mortgaged second must be sold before the piece mortgaged first). *But see* Worth v. Hill, 14 Wis. 607, 612 (1861) (reaching the opposite conclusion). *See generally* Annot., *supra* note 49.

[54] *See* Devine v. United States Mortgage Co., 48 S.W. 585, 592 (Tex. Civ. App. 1898) (where owner of mortgaged land sells part, then puts junior mortgage on remainder, part covered by junior mortgage must be sold first to satisfy senior mortgage); note 53 *supra*.

[55] 368 So. 2d at 822.

[56] *Id.* at 823.

[57] *Id.* at 824.

[58] *Id.*

[59] *Id.*

Jim Miller Construction Company, the owner of Tract I.[60]

This holding explored neither the consequences of Tract I being sold after Tract II was sold, nor of Tract II being mortgaged by Anderson after Tract I was sold.[61] A holding based on the correct application of the doctrine of inverse order of alienation would have first included a determination that of the property covered by the senior mortgage, the last to be sold or encumbered by Miller was the equity of redemption in Tract I under the junior mortgage sold to Jim Miller Construction Company.[62] The next to the last transaction was the sale of Tract II, and the first was the mortgage of Tract I.[63] Therefore, the supreme court should have allowed Mississippi Valley to foreclose on the construction company's equity of redemption, set aside sufficient proceeds to satisfy the Sims mortgage, and apply the remaining proceeds to its mortgage. Next, since equity regards as done that which ought to have been done,[64] the amount Mississippi Valley would have realized if it had foreclosed on Tract II should have been subtracted from the amount remaining unsatisfied under its mortgage. Finally, the amount set aside for the Sims junior mortgage should have been applied to satisfy the senior mortgage.[65] Since the Anderson-Howell mortgage was not derived from Miller, it should have been ignored in this context. Given the values of the properties involved in this case, the result reached by this method would be identical with the result reached by the supreme court.[66] Under either method, Tract I would be foreclosed upon, the Sims mortgage would be paid off, and Mississippi Valley would get the remainder. Nevertheless, the court's holding conceivably could indicate that a different result might have been reached with different property values.[67] Since the court's rationale is unclear, it must be assumed that it followed the proper line of reasoning outlined above, reached the correct conclusions, then stated its holding in the simplest manner, which, unfortunately, left the possibility of incorrect inferences being drawn by future researchers.

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[60] *Id.*

[61] *Id.* at 820-24.

[62] *Id.* at 820-21. For a clear explanation of the principles involved, see Annot., *supra* note 49, at 53.

[63] Tract I was mortgaged to Sims on April 28, 1971. Tract II was sold on April 29, 1971. Tract I was sold on November 30, 1971. 368 So. 2d at 820-21.

[64] *Cf.* Faulkner v. Faulkner, 192 Miss. 358, 365, 5 So. 2d 421, 422 (1942) (court regarded as accomplished the insured's request that insurance company change beneficiary).

[65] *See generally* Annot., *supra* note 49, at 52-58.

[66] Assuming that Tract II was worth $115,000 as the court stated, 368 So. 2d at 824, and that Tract I would sell for about $54,000, as it did under the lower court's sale, *id.* at 822, the results of the procedure described would be: Tract I would be sold for $54,000, $14,000 would be set aside for the Sims mortgage, and the remaining $40,000 would go to Mississippi Valley. Next, $115,000 from Tract II would be subtracted, thus extinguishing Mississippi Valley's debt. The $14,000 remaining from the sale of Tract I would be paid

A remaining problem is that it is impossible to determine from the supreme court's opinion exactly what the lower court did or the theory relied upon. Apparently, the lower court found that Mississippi Valley should have foreclosed on Tract II before Tract I; however, the court charged the senior mortgage with only $40,000, the value of Tract II without improvements. It would have been helpful if the supreme court had recited the chancellor's reasoning and had stated wherein he had erred.[68]

Pongetti was a very complex case, both legally and factually. Although the court reached the correct result, the opinion regrettably was unclear about the reasoning used to reach that result. Had the court explicitly adopted the rationale outlined above, the rights and liabilities of parties in Mississippi under the doctrine of inverse order of alienation would be more

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to Sims.

[67] For instance, if the chancellor had properly excluded the value of improvements on Tract II in valuing the foreclosure of Tract II, then the hypothetical foreclosure of Tract II would not have extinguished Mississippi Valley's mortgage, and most, if not all, of the Sims mortgage's value would have gone to Mississippi Valley.

[68] The chancellor's opinion states without elaboration that the improvements were not involved in the suit. Sims v. Bankers Trust Sav. & Loan, No. 24,450 at 4 (Ch. Lee County April 19, 1976). In their brief to the supreme court appellees argued that had Mississippi Valley foreclosed on Tract II it would not have been able to collect on the value of improvements because of the equitable principle that one making improvements to land, in good faith but with a mistaken belief that he owns the land, will not be deprived of the land without compensation for the improvements. Although good arguments can be made on both sides of this issue, neither the chancellor nor the supreme court addressed it.

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IV. DEFICIENCY JUDGMENT AFTER MORTGAGE FORECLOSURE

In all states, with certain limitations in each jurisdiction, a mortgagee is generally entitled to a deficiency decree for the balance of the debt owed by the mortgagor after proceeds of the foreclosure are applied to the debt.[69] Since the sale price is often substantially less than the fair market value of the property, the unbridled operation of this process can, in some cases, be very unfair to the mortgagor.[70] The inequity of awarding a personal judgment for such a deficit is particularly acute in the common situation where the mortgagee is the sole bidder at the foreclosure sale.[71] For this reason a number of states have enacted statutes which, in one way or another, limit the mortgagee's right to a deficiency judgment.[72] Mississippi has no statutory guidelines

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[69] *See* G. OSBORNE, *supra* note 47, § 333, at 698-99.

[70] *Id. See, e.g.,* Hardin v. Grenada Bank, 182 Miss. 689, 713, 180 So. 805, 812 (1938) (proof showed that on day of sale land was worth five to eight times amount paid by purchasers); Wheeler v. Cleveland State Bank, 174 Miss. 542, 550, 164 So. 400, 401 (1935) (second mortgage subordinated to the extent of $26,000 was foreclosed for only $3,000, though land was worth $48,000 according to witnesses). *See also* Comment, *Deficiency Judgments in Louisiana,* 49 TUL. L. REV. 1094, 1109 (1975) (scope of deficiency judgment should be circumscribed to prevent creditor's overreaching).

[71] *See, e.g.,* Mississippi Valley Title Ins. Co. v. Horne Constr. Co., 372 So. 2d 1270, 1270 (Miss. 1979) (mortgagee was sole bidder at foreclosure sale).

The bidding on land at a foreclosure sale has even been regarded as a property right of the mortgagee. *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 594-95 (1935) (noting that property rights of mortgagee under Kentucky law included right to "protect its interest in the property by bidding at such sale whenever held, and this thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt . . . .").

[72] On the whole, legislation placing limitations on the amount of recovery under a deficiency judgment gives the mortgagor credit for the fair market value of the property at the time of the foreclosure sale, as opposed to the foreclosure price itself. However, nearly every state has its own formula for deciding the amount of deficiency due. In addition, most states presume that the sale is not for fair market value, and, consequently, require some type of appraisal. *See* Comment, *The Role of State Deficiency Judgment Law in FHA Insured Mortgage Transactions,* 56 MINN. L. REV. 463, 466 & nn. 23-25 (1972) (state by state breakdown of various statutory solutions). *See generally* G. OSBORNE, *supra* note 47, § 335, at 704.

Some statutes limit the amount of the deficiency decree to the difference between the debt owed and the fair market value of the property. *See, e.g.,* United States v. Riley, 340 F. Supp. 1164, 1167 (D.C. La. 1972) (the court cited LA. REV. STAT. ANN. § 13:4106 (West 1968), LA. CODE CIV. PRO. ANN. art. 2771 (West 1952), for proposition that on deficiency decrees beyond a bare authorization to make them at the time of confirmation of sale.[73]

Notwithstanding the paucity of statutory safeguards for mortgagors subject to deficiency judgments, in the 1979 term the Mississippi Supreme Court established groundbreaking precedent in this area with *Mississippi Valley Title Insurance Co. v. Horne Construction Co.*[74] In *Mississippi Valley Title* the mortgagee, First Memphis Realty Trust (FMRT), made a construction loan, secured by a deed of trust, to Roell Development Corporation (RDC) for $1,490,000.[75] As construction neared completion, RDC found that it needed approximately $80,000 more for completion.[76] FMRT gave RDC assurances that it would loan $500,000 more to ensure completion.[77] When it was too late for RDC to secure funds elsewhere, FMRT repudiated its agreement to loan more money, foreclosed on the property,[78]

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under state law mortgagee could not get a deficiency judgment after foreclosure without appraisal of property, but decision was based on federal law producing opposite result). *See generally* G. OSBORNE, *supra* note 47, § 335, at 702-05; Comment, *supra* note 70, at 1094; Comment, *Mortgages—"Depression Jurisprudence"—Remaining Effects in Statutory Law,* 47 MICH. L. REV. 254, 259 n.7 (1948).

[73] MISS. CODE ANN. § 11-5-111 (1972) provides:

> Upon the confirmation of the report of sale of any property, real or personal, under a decree for sale to satisfy a mortgage, deed of trust, or other lien on such property, if there be a balance due to the complainant, the court, upon motion, shall give a decree against the defendant for any such balance for which by the record of the case he may be personally liable, upon which decree execution may issue.

[74] 372 So. 2d 1270 (Miss. 1979). The several cases which have addressed the issues involved in the instant case support the conclusions reached. *See, e.g.*, Smith v. General Invs., Inc. 246 Miss. 765, 769, 150 So. 2d 862, 864 (1963) (mere inadequacy of price at foreclosure sale is insufficient cause for setting it aside in absence of fraud, irregularity or other inequitable circumstances); Wheeler v. Cleveland State Bank, 174 Miss. 542, 553-54, 164 So. 400, 402-03 (1935) (price at foreclosure not so inadequate as to invoke equitable jurisdiction of the court); Federal Land Bank v. Robinson, 160 Miss. 546, 561, 134 So. 180, 184-85 (1931) (deficiency decree not allowed where foreclosure amounted to legal fraud on mortgagor). All three cases espouse the idea that a mortgagee's right to a deficiency decree depends upon the equities of the situation.

[75] 372 So. 2d at 1270.

[76] *Id.* at 1272.

[77] *Id.* at 1273.

[78] *Id.* The court rejected FMRT's argument that the reason it "went back" on its agreement was that title to the property had been transferred from RDC to RODA, another Mississippi corporation. The court found that even though FMRT and RDC had agreed that there would be no transfer of title before completion of the project, the testi-

and, as the only bidder, bought the property for $1,170,000.[79] When the construction company employed by RDC brought suit against RDC, FMRT, and others for the balance due on the construction contract, FMRT filed a cross-bill against RDC for a deficiency judgment.[80] The Chancery Court of the First Judicial District of Hinds County, in dismissing the cross-bill, held that it would not be equitable under the circumstances to render a deficiency decree in favor of FMRT.[81] The Mississippi Supreme Court affirmed, stating that a mortgagee has no right to a deficiency decree where such would be inequitable.[82]

While *Mississippi Valley Title* is in general accord with the philosophical basis for statements found in earlier cases,[83] it

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mony was undisputed that when a re-transfer of the property back to RDC was offered, FMRT refused. FMRT's reason for refusal was that a lien for engineering services for $10,000 had been placed of record, but the court found "abundant testimony" showing that previous additional advances included payment of this account. *Id.*

[79] *Id.* at 1270.

[80] *Id.* at 1271.

[81] *Id.*

[82] *Id.* at 1272-74. The supreme court initially dismissed FMRT's argument that because the chancellor had stated that he did not find FMRT's bid at the foreclosure sale to be unconscionable, FMRT was automatically entitled to a deficiency judgment. *Id.* at 1272. The court approved the chancellor's finding that FMRT had continuously been willing to advance more money to RDC and was willing to advance $500,000 more into the property, although RDC needed only $80,000 for completion. RDC was depending on further financing, the court found, and there was "some element of high-handedness" in FMRT's moving to protect its own position by foreclosure. *Id.* at 1271. The court found that it would have been extremely difficult to find alternative financing in time to prevent the foreclosure. *Id.*

[83] When sued for a deficiency judgment, most parties to previous Mississippi cases have attempted to assert as a defense the invalidity of the foreclosure sale. When the asserted invalidity has been based on something other than a failure to comply with statutory foreclosure procedures, the defense has been basically the same as that found in *Mississippi Valley Title,* and only the relief requested has been different. The Mississippi Supreme Court has repeatedly asserted that a foreclosure may be so inequitable as to require its avoidance. *See, e.g.,* Smith v. General Invs., Inc., 246 Miss. 765, 769, 150 So. 2d 862, 864 (1963) (inadequacy of price at a foreclosure sale is not sufficient cause for setting it aside unless there was fraud, irregularity, or other circumstances appealing to the equitable jurisdiction of the court, or the inadequacy was so gross as to shock the conscience of the court); Wheeler v. Cleveland State Bank, 174 Miss. 542, 553, 164 So. 400, 402 (1935) (under the circumstances the price bid at foreclosure was not so grossly inadequate as to imply fraud); Federal Credit Co. v. Boleware, 163 Miss. 830, 835, 142 So. 1, 2 (1932) (in foreclosure on a truck under a conditional sales contract, mere inadequacy of price, in absence of irregularity, will not avoid the sale unless the inadequacy is so gross as to furnish evidence of fraud); Federal Land Bank v. Robinson, 160 Miss. 546,

marks the first time[84] that the court has found the mortgagee's conduct sufficiently inequitable to warrant denial of the deficiency decree.

While *Mississippi Valley Title* does not change the law of this state nor vary in principle from the law of other states,[85] its uniqueness renders it worthy of note. It is important to remember that a mortgagee, even when in full compliance with the law, does not have an absolute right to a deficiency decree after foreclosure. Statutory guidance might well be helpful, and statutory protection for mortgagors may well be needed,[86] but the supreme court is to be congratulated for taking a first step in this direction.

V. MISSISSIPPI SURFACE COAL MINING AND RECLAMATION ACT

The 1979 session of the Mississippi Legislature yielded the Mississippi Surface Coal Mining and Reclamation Act,[87] an act of major significance to the state's property and mineral law.

The Mississippi Legislature in 1977 passed a strip mining law applicable to all surface-mined minerals.[88] That same year, the United States Congress passed a federal strip mining bill,[89]

558-61, 134 So. 180, 184-85 (1931) (where there was fraudulent sale for an inadequate price without notice to the mortgagor, mortgagor was entitled to a recoupment to diminish or extinguish remaining debt).

[84] One case reached a similar result by allowing the mortgagor a recoupment in a deficiency suit following a fraudulent foreclosure. Federal Land Bank v. Robinson, 160 Miss. 546, 561, 134 So. 180, 185 (1931).

[85] *See* G. OSBORNE, *supra* note 47, § 329, at 689 (American rule is that a court may refuse to confirm a sale if the price shocks the court's conscience or if there are additional circumstances suggesting unfairness).

[86] The general American system allows a "double" satisfaction in that the mortgagee can obtain both clear title to the property for a low price plus a deficiency judgment. This is in contrast to the law of England, where a mortgagee may never purchase at the foreclosure sale. G. OSBORNE, *supra* note 47, § 333, at 700; *see* Turner, *The English Mortgage of Land as a Security*, 20 VA. L. REV. 729, 734 (1934) (the trend of American practice is to allow the mortgagee to purchase at the foreclosure sale).

[87] Mississippi Surface Coal Mining and Reclamation Act, ch. 477, 1979 Miss. Laws 928 (codified at MISS. CODE ANN. §§ 53-7-5 to -75, 53-9-1 to -91 (Supp. 1979)).

[88] Mississippi Surface Mining and Reclamation Act, ch. 476, 1977 Miss. Laws 881. This law, as originally adopted, covered almost all minerals, but the 1979 Act amends it to exclude coal from the original Act's coverage. MISS. CODE ANN. §§ 53-7-5, -19, -23, -25, -35, -45, -51, -55, -59, -65, -67, -75 (Supp. 1979).

[89] Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328

applicable only to coal,[90] requiring any state desiring to regulate its own surface coal mining to develop a state regulatory scheme as stringent as the federal scheme.[91] The Mississippi Surface Coal Mining and Reclamation Act (MSCM&RA) was designed to satisfy this federal mandate. Consequently, the MSCM&RA follows the federal bill closely.[92]

The crux of the Act's regulatory scheme is the requirement that virtually all lands from which coal has been strip-mined must be reclaimed.[93] This provision is effectuated by requiring anyone who wishes to strip-mine coal to get a permit.[94] The permit application must be accompanied by, *inter alia,* a reclamation plan[95] and a performance bond conditioned upon satisfactory reclamation.[96] The plan and the bond are both essential to the success of the Act.

The reclamation plan is crucial in that it gives structure to the reclamation effort. A detailed plan forces both the operator and the regulatory agency to consider, before mining begins, the practical aspects of reclamation, such as whether or not reclamation is feasible, what type of reclamation will be most effective, and what steps must be taken during actual mining to make reclamation most effective. The reclamation plan requirements of the MSCM&RA are not explicit. The federal Surface Mining Control and Reclamation Act, on the other hand, has more detailed requirements specifically indicating what action must be

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(Supp. II 1978).

[90] *Id.* § 1202(a).

[91] *Id.* § 1253 (in addition to adopting a law in compliance with the federal law, a state must demonstrate that it has money, manpower, procedures, etc. necessary for effective enforcement of the law).

[92] *Compare, e.g., id.* § 1261 (revision of permits) *with* MISS. CODE ANN. § 53-9-35 (Supp. 1979) (permit revisions).

[93] The Act does not apply to three types of operations: a) extraction of coal by a landowner for his own noncommercial use; b) extraction of coal as a result of local, state, or federally financed highway or other similar construction; and c) extraction of coal incidental to the extraction for commercial use of other material where coal does not constitute more than 16 ⅔% of the tonnage of the other material. MISS. CODE ANN. § 53-9-81 (Supp. 1979). The federal bill also contains three exceptions. Two are identical with a) and b) above, but in place of c) the federal law exempts commercial extraction of coal from two acres or less. 30 U.S.C. § 1278(2) (Supp. II 1978).

[94] MISS. CODE ANN. § 53-9-21 (Supp. 1979).

[95] *Id.* § 53-9-29.

[96] *Id.* § 53-7-31.

taken.[97] The rules and regulations which must be promulgated under the Act[98] will have to address this issue. Curative though they may be, it would have been more effective to follow the example set in the federal bill.

The amount of the bond that an operator is required to post is perhaps the single most important aspect of any reclamation law. If the bond is not high enough, an operator may simply forfeit it rather than incur the extra expense of reclamation.[99] Duplicating what is possibly the major flaw of the federal bill, the MSCM&RA has a mere $10,000 per permit area minimum as its only requirement.[100] Assuming a baseline cost of $500 per acre to reclaim mined lands, utilization of the $10,000 minimum bond is inadequate security for any operation covering more than 20 acres. Rules and regulations may cure this defect, as may administrative discretion in requiring greater bond, but the lack of a statutory mandate puts unnecessarily severe pressures on state officials and invites abuse at some point in the future. Arguably, a better statute would contain a per acre minimum bond instead of, or in addition to, a per permit minimum.[101]

It should not be inferred from the foregoing paragraphs that the MSCM&RA is a weak or inadequate act. Large acts, necessarily born of compromise, are never perfect. The two major faults in this act may be completely cured by administrative ingenuity and vigilance. In addition, the Act handles many other potential problem areas fairly and efficiently. For example, it prohibits state personnel from having a financial interest in any regulated mine.[102] It provides for a detailed and balanced adjudicative process within the agency and appeal to the courts.[103] It contains provisions for granting, suspending, revoking, and amending permits.[104] It provides for various penalties for violation of the Act.[105] Finally, it ties up a number of loose ends.[106] It does all these things fairly and effectively. Now that large scale strip mining operations are looming on its horizon, Mississippi is fortunate to have a workable law.

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[97] *Compare id.* § 53-9-29 (reclamation plan to be included in request for permit) *with* 30 U.S.C. § 1258 (Supp. II 1978) (requirements for reclamation plan).

[98] MISS. CODE ANN. § 53-9-11 (Supp. 1979).

[99] *See generally* Comment, *The Regulation of Strip Mining in Alabama, An Analysis of the 1969 Alabama Surface Mining Act,* 23 ALA. L. REV. 423, 439-40 (1970-71).

[100] MISS. CODE ANN. § 53-9-31 (Supp. 1979). Ten thousand dollars is the only fiscal requirement; however, the administrator of the surface mining and reclamation operation section of the Bureau of Geology and Energy Resources is authorized to set the bond sufficiently high to cover the cost of reclamation in the event of forfeiture.

[101] A per acre minimum ensures that large operations are covered by a sufficient bond. A per operation minimum ensures that small operations are covered by a sufficient bond.

[102] MISS. CODE ANN. § 53-9-19 (Supp. 1979).

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[103] *Id.* §§ 53-9-37 to -39, -55, -57 to -59, -63 to -69.

[104] *Id.* §§ 53-9-21, -23, -33, -35, -39, -69.

[105] *Id.* §§ 53-9-55 to -59, -63, -69.

[106] *Id.* §§ 53-9-41 (exploration permits), -47 (surface effects of underground coal mining), -51 (inspections of mine sites), -67 (standing to sue under act), -73 (federal lands within state), -85 (water supply of landowners), -87 (training and certification of blasters).

TORTS

During the 1979 term, the Mississippi Supreme Court decided thirty tort cases which were designated for publication, four of which merit commentary. The decisions not discussed in this section dealt with negligence,[1] products liability,[2] malicious prosecution,[3] false imprisonment,[4] damages,[5] and wrongful death.[6]

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[1] Cannon v. Jones, 377 So. 2d 1055, 1057 (Miss. 1979) (death of flagman upon being struck by agricultural aircraft not proximately caused by any negligence on part of pilot); Downs v. Corder, 377 So. 2d 603, 605 (Miss. 1979) (property owner liable for injuries to independent contractor caused by latent defect which the contractor had not undertaken to repair); Mississippi Power & Light Co. v. Johnson, 374 So. 2d 772, 775 (Miss. 1979) (issues of proximate causation and foreseeability properly submitted to jury); Singleton v. Wiley, 372 So. 2d 272, 274-75 (Miss. 1979) (instructions regarding assumption of risk and comparative negligence proper where plaintiff fell off the trunk of an automobile owned and operated by defendant); Robinson v. Howard Bros., Inc., 372 So. 2d 1074, 1076 (Miss. 1979) (independent intervening act of murder by minor superseded negligence of defendant who sold firearm to minor in violation of state statute); Barr v. Davis, 369 So. 2d 513, 514 (Miss. 1979) (deputy's negligence may be imputed to sheriff if deputy on official business of sheriff at time of accident); Mississippi Chem. Corp. v. Rogers, 368 So. 2d 220, 222 (Miss. 1979) (employer has duty either to provide a reasonably safe place to work or to warn independent contractor of hazardous conditions at work site); Munford, Inc. v. Peterson, 368 So. 2d 213, 219 (Miss. 1979) (granting of instructions by trial court which stated that minor plaintiff was not negligent as a matter of law in connection with his automobile accident was reversible error, notwithstanding that the sale of beer to minor plaintiff by defendant was in violation of state statute and constituted negligence per se, since such instructions precluded the jury from applying comparative negligence); Gates Rubber Co. v. Duke, 367 So. 2d 910, 912 (Miss. 1979) (evidence insufficient to form basis for sudden emergency instruction); Crossley v. James, 365 So. 2d 957, 959 (Miss. 1979) (instructions disallowed since they placed entire burden on plaintiff to avoid automobile collision regardless of defendant's negligence).

[2] Alley v. Praschak Mach. Co., 366 So. 2d 661, 665 (Miss. 1979) (jury instructions on question of assumption of risk proper in products liability case).

[3] Pugh v. Easterling, 367 So. 2d 935, 939 (Miss. 1979) (no cause of action for malicious prosecution where plaintiff found guilty in prior criminal proceeding even though not sentenced); Masonite Corp. v. Baldwin, 365 So. 2d 641, 643 (Miss. 1979) (no cause of action for malicious prosecution arises from acquittal in which there was probable cause for filing of affidavit).

[4] Jarjoura v. Fred's One & Two Dollar Store, Inc., 370 So. 2d 696, 697 (Miss. 1979) (trial judge should refuse motion for directed verdict on issue of probable cause for search under the Qualified Privilege Shoplifting Act where the evidence is conflicting).

[5] Fore v. Quave, 377 So. 2d 919, 919 (Miss. 1979) (jury may refuse to award damages where plaintiff, hurt in three-car collision and suing one driver, has been adequately compensated by settlement with the other driver); Mississippi Power Co. v. Russell, 377

I. SOVEREIGN IMMUNITY

In *Jones v. Knight,*[7] the Mississippi Supreme Court was again[8] confronted with the issue of whether or not to abrogate the doctrine of sovereign immunity[9] by judicial decree, and again a majority of the court refused to do so. Jones, the appellant, brought suit for injuries allegedly caused when Knight, a state park ranger, assaulted him by spraying him with mace.[10] Jones joined the State Park Commission, its director and mem-

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So. 2d 595, 597 (Miss. 1979) (trial court's decision as to remittitur will be overturned only on a showing of abuse of discretion); Toyota Motor Co. v. Sanford, 375 So. 2d 1036, 1037-38 (Miss. 1979) (award of additur by trial judge was abuse of discretion where the amount was four times that awarded by the jury); McNair Transp., Inc. v. Crosby, 375 So. 2d 985, 986-87 (Miss. 1979) (award of additur by trial judge was abuse of discretion where the amount was seven times that of special damages established at trial); West Cash & Carry Bldg. Materials, Inc. v. Palumbo, 371 So. 2d 873, 877-78 (Miss. 1979) (no punitive damages instruction allowed where defendant's uncontradicted testimony established reasonable care); United States Indus., Inc. v. McClure Furniture Co., 371 So. 2d 391, 393 (Miss. 1979) (punitive damages instruction allowed for gross negligence); Clary v. Global Marine, Inc., 369 So. 2d 507, 509-10 (Miss. 1979) ("collateral source" rule applicable); Comer v. Chestnut, 365 So. 2d 1212, 1214 (Miss. 1979) (defendant may show mitigating circumstances to reduce damages).

[6] Partyka v. Yazoo Dev. Corp., 376 So. 2d 646, 650 (Miss. 1979) (cause of action lies with estate of surviving wife who dies shortly after husband).

[7] 373 So. 2d 254 (Miss. 1979).

[8] *See, e.g.,* Berry v. Hinds County, 344 So. 2d 146, 151 (Miss.) (the legislature is in a better position to abrogate governmental immunity), *cert. denied,* 434 U.S. 831 (1977); State Highway Comm'n v. Gully, 167 Miss. 631, 648-49, 145 So. 351, 355 (1933) (sole power to direct payment of claims from state treasury is vested in the legislature). *See generally 1977 Mississippi Supreme Court Review,* 49 MISS. L.J. 301, 442-46 (1978) (Mississippi has consistently adhered to the doctrine).

[9] Under the doctrine, governmental entities are protected from tort liability. *See* City of Pass Christian v. Fernandez, 100 Miss. 76, 82, 56 So. 329, 329 (1911) (protected public or governmental duties are given to the city by the state while other duties of the city are corporate or private). The doctrine developed in England as an expression of the concept that "the King can do no wrong," and was articulated in the celebrated case of Russell v. Men of Devon, 2 Term, R. 671, 100 Eng. Rep. 359 (1788). Massachusetts was the first American jurisdiction to adopt the doctrine in Mower v. Leicester, 9 Mass. 247 (1812). Sovereign immunity refers rather to the state, its agencies, and its subdivisions than to municipalities. *See generally* Comment, *A Case for the Abrogation of Municipal Tort Immunity in Mississippi,* 41 MISS. L.J. 289, 289-309 (1970) (authors discuss the benefits that would accrue to taxpayers if municipal governmental immunity were completely abrogated).

[10] 373 So. 2d at 255-56.

bers as defendants.[11] The trial court sustained the defendants' demurrer.[12] On appeal, the appellant urged that the doctrine of governmental immunity was archaic and should be abolished.[13] The Mississippi Supreme Court, relying on *Berry v. Hinds County*,[14] held that the state legislature was in a better position than the court to make decisions as to the appropriation of state funds,[15] especially since "[s]tate agencies are operated within budgetary limits, and legislation is prerequisite to the inherent budgetary problems which a judgment against a state agency would create."[16] The court affirmed as to all parties except Knight, against whom the case was remanded.[17]

In a lengthy and well-reasoned dissent in which Chief Justice Patterson joined, Justice Bowling made no less than thirteen arguments in favor of judicial abrogation: (1) the modern availability of insurance to be purchased by the state agency or political subdivision;[18] (2) the prospective nature of a ruling of abrogation, which would give state agencies an opportunity to become fully insured;[19] (3) the inequity of leaving the state employee "holding the bag";[20] (4) the modern trend toward abrogation;[21] (5) the inequity of requiring insurance coverage on vehicles operated by persons, firms, copartnerships, associations or corporations, but not on vehicles owned by the state or any of its political subdivisions;[22] (6) the inequity of leaving the innocent person, damaged by the actions of a state agency, without a remedy;[23] (7) the concept expressed by the statement "the King can do no wrong" is contrary to the principles for which the framers of the Constitution fought;[24] (8) the doctrine of sovereign immunity violates sections three and fourteen of the Mississippi Constitution, and article three and the fourteenth amendment of the United States Constitution;[25] (9) the Mississippi Legislature's abolition of the doctrine in certain circumstances hinders clarification of the rights of citizens coming in contact with the state;[26] (10) the inequities of the present exceptions to the doctrine;[27] (11) the encouragement of governmental responsibility that abrogation would foster;[28] (12) the argument that since the doctrine was created by the judiciary, it should be abolished by the judiciary;[29] and (13) the concern that Mississippi not be the last state to abrogate the doctrine.[30]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 344 So. 2d 146 (Miss.), *cert. denied*, 434 U.S. 831 (1977).

[15] 373 So. 2d at 256-57.

[16] *Id.* at 256.

[17] *Id.* at 257.

[18] *Id.* at 259. *See* Mayle v. Pennsylvania Dep't of Highways, 479 Pa. 384, 388 A.2d 709, 714 (1978) (government insurance no more expensive than that required of private parties). *See generally* Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588, 588-607 (author argues that state legislation is necessary to overcome judicial resistance to the abrogation of sovereign immunity).

[19] 373 So. 2d at 258.

[20] *Id.* The case was remanded as to the state employee only for a determination of his liability, if any.

[21] *Id.* Over thirty states have completely abolished sovereign immunity. *See 1977 Mississippi Supreme Court Review*, *supra* note 8, at 443 nn.97 & 98.

[22] 373 So. 2d at 258-59.

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[23] *Id.* at 259.

[24] *Id. See, e.g.,* Jackson v. City of Florence, 294 Ala. 592, 320 So. 2d 68, 69 (1975) (that sovereign immunity "occurred in America, given the historical background which led to the Revolutionary War, is 'one of the mysteries of legal evolution' "); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 21-22, 163 N.E.2d 89, 94 (1959) ("Revolutionary War was fought to abolish that 'divine right of kings' on which the [immunity] theory is based"); Hicks v. State, 88 N.M. 588, 544 P.2d 1153, 1156 (1975) (same).

[25] 373 So. 2d at 259-60. MISS. CONST. art. 3, § 24 states: "All courts shall be open; and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." *Id.* art. 3, § 14 states: "No person shall be deprived of life, liberty or property except by due process of law." U.S. CONST. amend. XIV, § 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

(emphasis added).

[26] 373 So. 2d at 260. *See, e.g.,* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961) (total governmental immunity does not exist since the doctrine has become riddled with exceptions which "operate so illogically as to cause serious inequality"); Brown v. Wichita State Univ., 217 Kan. 279, 540 P.2d 66, 80-82 (1975) (illogical exceptions are incompatible with federal constitutional safeguards); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378, 380-81 (1974) (the many exceptions cause serious inequalities since some of those injured can recover while others cannot).

The legislative exceptions in Mississippi are MISS. CODE ANN. § 19-7-8 (Supp. 1979) (counties may purchase liability insurance for county motor vehicles although recovery is limited to the extent of insurance carried); *id.* §§ 19-13-51, -55 (1972) (within board of supervisors' discretion to allow damages for injury to property and stock as a result of defects in county bridges, causeways, or culverts); *id.* § 37-41-37 (county or school district liable for damages caused by negligent operation or maintenance of school buses).

[27] 373 So. 2d at 260. *See 1977 Mississippi Supreme Court Review, supra* note 8, at 445 n.102 (arguing that legislative exceptions cause inequalities).

A majority of states have abolished the doctrine of sovereign immunity either by judicial or legislative action.[31] Furthermore, modern critical commentary does not favor retention of the doctrine.[32] Nevertheless, the Mississippi judiciary refuses to abrogate the doctrine, thereby leaving the decision in the hands of the legislature. *Jones,* however, signals a changing attitude among the justices of the court. All nine justices in *Berry* had concurred in upholding the doctrine, including the present Chief Justice Patterson.[33] In *Jones,* the Chief Justice changed his mind in favor of abrogation along with Justice Bowling, a newcomer to the court since the *Berry* decision. Thus, *Jones* should serve as a warning to the legislature that the court's support of sovereign immunity is waning, and that the legislature should abrogate the doctrine itself and provide for insurance coverage in the process.

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[28] 373 So. 2d at 261. *See, e.g.,* Board of Comm'rs v. Splendour Shipping & Enterprises Co., 273 So. 2d 19, 25-26 (La. 1973) (abolition of immunity will result in more responsible action by state agencies and their employees, especially since there is hardly any sector of private life free from governmental intervention); Mayle v. Pennsylvania Dep't of Highways, 479 Pa. 384, 388 A.2d 709, 714 (1978) (government, if suable in tort, may become more efficient). *See generally* Note, *Economic Analysis of Sovereign Immunity in Tort,* 50 S. CAL. L. REV. 515, 515-48 (1977) (author makes extensive use of mathematical models to examine the economic impact of the immunity rule).

[29] 373 So. 2d at 265-66. *See, e.g.,* Board of Commr's v. Splendour Shipping & Enterprises Co., 273 So. 2d 19, 25 (La. 1973) (origin of doctrine is judicial and in state after state it is being abrogated by the courts).

[30] 373 So. 2d at 267.

[31] *See* note 21 *supra.*

[32] *See, e.g.,* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 971 (4th ed. 1971); Borchard, *Government Liability in Tort,* 34 YALE L.J. 1, 2-6 (1924) (no theoretical justification for the doctrine); Comment, *supra* note 9, at 289-301 (traces the development of the doctrine in Mississippi and analyzes Mississippi cases); 41 Miss. L.J. 471, 477-81 (1970) (cites many critical commentaries and cases).

[33] 344 So. 2d at 151. In Parks v. City of Long Beach, 372 So. 2d 253 (Miss. 1979), decided three months before *Jones,* the court held that the placement of a traffic signal by a railroad crossing was a discretionary matter within the police powers of the city, that the municipality was not acting in a proprietary capacity, and was therefore immune under the doctrine of sovereign immunity. *Id.* at 254. The court distinguished Tucker v. City of Okolona, 227 So. 2d 475 (Miss. 1969), in which it held that a malfunctioning traffic signal was within the proprietary capacity of the city, and that the municipality was not immune from tort liability. The question of abrogation of sovereign immunity was not before the court in *Parks.* 372 So. 2d at 253. For a discussion of the *Tucker* decision, see 41 MISS. L.J. 471 (1970).

II. NEGLIGENCE AS A MATTER OF LAW

The most controversial tort decision rendered in 1979 was that of *McGee v. Bolen.*[34] Appellants, parents and siblings of four-year-old Jeremy McGee, brought suit for wrongful death against the driver of an automobile that struck and killed the child as he darted out in front of the vehicle.[35] The jury returned a verdict for the driver after the trial court refused the appellants' motion for a peremptory instruction.[36] On appeal, the Mississippi Supreme Court reversed, holding that the appellee was negligent as a matter of law[37] under the circumstances.

Justice Robertson, with whom Justices Walker and Broom joined, vigorously dissented,[38] arguing that the majority opinion was a departure from the dictates of section 11-7-17 of the Mississippi Code.[39] Believing that there was an issue for the jury, and citing a 1975 decision,[40] he contended that the court should substitute its judgment for that of the jury only when the verdict is contrary to the overwhelming weight of the evidence or is a product of bias, passion, and prejudice.[41] Justice Smith briefly dissented, stating that he would reverse and remand the case for a new trial on all issues, apparently because of the closeness of the issue whether the case created an issue for jury determination.[42]

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[34] 369 So. 2d 486 (Miss. 1979).

[35] *Id.* at 487-88. The appellee was driving south on a state highway at a rate not in excess of the posted 55 mile per hour speed limit. *Id.* at 488. When he crested a hill, he saw four children playing alongside the highway, two children on the east side shoulder two feet from the highway, and two children on the west side shoulder one foot from the highway. *Id.* At this point he reduced his speed to 25 miles per hour, keeping his foot on the brake pedal, about a quarter of a mile north of the children. *Id.* "As appellee's car approached, [a] . . . small girl on the right side held out her hand in front of the child next to her as if to restrain him from entering the road." "As appellee approached . . . from the north, one Chambers was driving an automobile northward. . . ." *Id.* Chambers approached at a speed of 35 miles per hour and the two cars met and passed about two car lengths north of where the impact occurred. *Id.* Just south of the two children on the west side, a fifth child, the decedent, darted into the road in front of appellee's car. *Id.* The appellee applied his brakes, leaving skid marks about six feet in length. *Id.* The force of impact threw the decedent southward about fourteen feet. *Id.* Both appellee and appellee's mother testified that they did not see the decedent until the second before impact. *Id.* at 488-91. Chambers testified that, as he was northward bound, he saw the decedent who "looked like he was trying to duck or hide or something" on the embankment below the shoulder and that as he passed appellee's car he glanced and saw the appellee's taillights come on and the child being knocked forward. *Id.* at 491.

[36] *Id.* at 487.

[37] *Id.* at 493.

[38] 369 So. 2d at 494 (Robertson, J., dissenting).

[39] *Id.* MISS. CODE ANN. § 11-7-17 (1972) provides: "All questions of negligence and contributory negligence shall be for the jury to determine."

Statutory[43] and case law[44] require that issues of negligence be resolved by jury determination.[45] Although there exists precedent for the position that when the facts are undisputed the issue of negligence is for court determination,[46] most decisions hold that if reasonable persons might draw different conclusions as to negligence, the question of negligence is always for the jury,[47] particularly in "child darting" cases.[48]

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[40] Shelton v. Coleman, 323 So. 2d 90, 91 (Miss. 1975) (citing Phillips v. Dow Chem. Co., 247 Miss. 293, 300-01, 151 So. 2d 199, 202 (1963) (to overrule, court must find jury verdict contrary to overwhelming weight of evidence, a product of bias, passion and prejudice, not of reason)).

[41] 369 So. 2d at 494 (Robertson, J., dissenting).

[42] *Id.* at 497 (Smith, J., dissenting) (stating that the issue was very close as to whether the question of liability should go to the jury).

[43] *See* note 39 *supra.*

[44] *See, e.g.,* Smith v. Walton, 271 So. 2d 409, 413 (Miss. 1973) (jury question as to negligence and contributory negligence exists when a pedestrian walking on the right side of the highway steps into the highway and is killed by defendant's automobile); Philco Distribs., Inc. v. Herron, 195 So. 2d 473, 477 (Miss. 1967) (the jury verdict for the plaintiff is not per se against the overwhelming weight of the evidence when the plaintiff is guilty of contributory negligence); DeLaughter v. Womack, 250 Miss. 190, 205, 164 So. 2d 762, 768 (1964) (generally, negligence is a question for jury, and not court, determination); Louisville & Nashville R.R. v. Price, 243 Miss. 99, 108, 137 So. 2d 787, 790 (1962) (since jury ignored issue of contributory negligence their verdict evidenced bias, passion and prejudice).

[45] *See* notes 43 and 44 *supra.*

[46] *E.g.,* Arnold v. Reece, 229 Miss. 862, 867-68, 92 So. 2d 237, 258 (1957) (upholding the trial court's refusal to allow peremptory instructions and permitting the jury to make the determination as to negligence); City of Greenville v. Laury, 172 Miss. 118, 122, 159 So. 121, 122 (1935), holding in pertinent part:

> [T]he question of negligence vel non is for the determination of the jury, unless the doing of the act which caused the injury complained of is not in dispute or conclusively appears from the evidence, and no inference except that of negligence or no negligence can be justly drawn therefrom, in which event the question is for the determination of the trial judge.

Id.

The majority in *McGee,* holding that where there is no issue of fact the court decides the issue of negligence,[49] relied on *Mercy Regional Medical Center v. Doiron,*[50] a case recently criticized as circumventing section 11-7-17 of the Mississippi Code.[51] Moreover, the majority reached this conclusion despite the jury's finding in the trial court that the appellee had not been negligent under the circumstances.[52] Considering the particular facts of *McGee,*[53] it is evident that reasonable minds could have drawn differing inferences concerning the appellee's negligence; therefore, the case should have been affirmed. One well-known scholar writes that the proper standard of conduct to be applied is what the reasonable man would have done under the circumstances, a question "to be determined in all doubtful cases by the jury, because the public insists that its conduct be judged in part by the man on the street rather than by lawyers, and the jury serves as a shock-absorber to cushion the impact of the law."[54] Indeed, as Justice Robertson pointed out in criticizing the majority opinion, "all of the testimony supporting the jury's verdict is ignored, and then from the vantage point of hindsight and the opportunity for cool deliberation in our cloistered chambers, we reach the studied conclusion" that the appellee was negligent as a matter of law.[55]

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[47] *See, e.g.,* Jones v. Dees, 241 Miss. 540, 546, 131 So. 2d 436, 437 (1961) (where there is the possibility of differing inferences the issue of negligence is a jury question); Long v. Magnolia Hotel Co., 227 Miss. 625, 632, 86 So. 2d 493, 496 (1956) (when the same conclusion would be reached by all reasonable men the issue of negligence should be taken from the jury); Kirkpatrick v. Love, 220 Miss. 174, 179-80, 70 So. 2d 321, 322 (1954) ("where reasonable men might draw different conclusions from the evidence as to negligence, the question is always for the jury"); Gow Co. v. Hunter, 175 Miss. 896, 907, 168 So. 264, 266-67 (1936) (even where the facts are undisputed, if, considering man's general experience and knowledge, different inferences as to negligence could be drawn, then the issue should be submitted to the jury).

[48] *See, e.g.,* Morris v. Boleware, 228 Miss. 139, 146, 87 So. 2d 246, 248 (1956) (jury verdict was not against the weight of the evidence in holding that the defendant was not negligent and "could not have reasonably anticipated that some child would suddenly run around a parked car in front of his moving automobile"); Gordon v. Carr, 226 Miss. 836, 843-44, 85 So. 2d 490, 494 (1956) (issue of whether the defendant used reasonable diligence and care in detecting and anticipating the actions of small child who dashed in front of defendant's car was properly submitted to jury); McMinn v. Lilly, 215 Miss. 193, 60 So. 2d 603 (1952) (jury question as to whether the truck driver used all reasonable care to avoid the collision or whether a sudden act by the child caused the accident to be unavoidable). *See generally* 4 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 151.14, at 206 (3d ed. 1965); 1 D. BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6612 at 529 (perm. ed. 1935).

[49] 369 So. 2d at 493.

[50] 348 So. 2d 243 (Miss. 1977).

[51] *See 1977 Mississippi Supreme Court Review, supra* note 8, at 440-42 (commentator argues that negligence should be determined by jury since reasonable minds might draw differing inferences).

[52] 369 So. 2d at 487.

[53] *See* note 35 *supra.*

III. JOINT AND SEVERAL LIABILITY NOTWITHSTANDING LACK OF CONCERTED ACTION BY TORTFEASORS

The Mississippi judiciary handed down a progressive decision in 1979 regarding the issue of joint and several liability of joint tortfeasors. In *D & W Jones, Inc. v. Collier,*[56] the appellant farming corporation operated commercial catfish ponds at two locations.[57] In 1974, each location suffered contamination from agricultural pesticides applied both by a ground rig and by airplane, so that ponds at both locations could neither be harvested nor operated during 1975.[58] Appellant brought suit for damages at one location against several adjacent farm owners who had used Toxaphene on their crops and against aerial applicators of the pesticide, which is highly toxic to fish.[59] The corporation brought a separate suit for losses at the other location against an entirely different set of farmers, all of whom had applied Toxaphene near the second location.[60] The defendants in each case filed affirmative defenses of misjoinder of parties and misjoinder of causes of action which the trial court sustained.[61]

The two cases were consolidated on appeal,[62] and the Mississippi Supreme Court, expanding *Westerfield v. Shell Petro-*

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[54] W. PROSSER, *supra* note 32, at 207.

[55] 369 So. 2d at 495 (Robertson, J., dissenting).

[56] 372 So. 2d 288 (Miss. 1979).

[57] *Id.* at 288.

[58] *Id.* at 289.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 288.

[62] *Id.*

leum Corp.[63] and rejecting *Masonite Corp. v. Burnham,*[64] held that concerted action is not necessary for joint and several liability if the separate negligent acts of independent tortfeasors combine to cause a single indivisible injury.[65] The cases were therefore reversed and remanded for trial upon the merits.[66]

The English common law rule limited the definition of joint tortfeasors to those who acted in concert.[67] Most of the early American tort cases would not allow the joinder of defendants without concert of action or joint breach of a common duty.[68] If the courts did permit joinder, they nevertheless relied on a variety of causation doctrines to hold each tortfeasor liable only for the injuries caused by his own tortious conduct.[69] In the 1920's and 1930's, commentators began to question the practice of denying recovery to an injured plaintiff simply because the damages to be assessed against each tortfeasor could not be apportioned exactly.[70]

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[63] 161 Miss. 833, 138 So. 561 (1932). In *Westerfield,* the plaintiff was a passenger in an automobile which collided with a truck owned and operated by Shell Petroleum Corporation. *Id.* at 835, 138 So. at 561. The court held that an action existed against both drivers despite the absence of concerted action. *Id.* at 838, 138 So. at 562.

[64] 164 Miss. 840, 146 So. 292 (1933). In *Burnham,* two defendants were responsible for polluting a stream, thereby creating a nuisance. *Id.* at 849, 146 So. at 293. The court held that the two defendants were not joint tortfeasors since they had acted independently, without concert, collusion, or common design. *Id.* at 854-55, 146 So. at 294-95. The court attempted to distinguish *Westerfield* on the basis that it was an action for personal injury and each joint tortfeasor was "fully aware of the negligence of the other, and proceeded then and there to contribute to the injury; they acted jointly although without agreement." *Id.* at 857, 146 So. at 296.

[65] 372 So. 2d at 294.

[66] *Id.*

[67] *See* Caygill v. Ipsen, 27 Wis. 2d 578, 135 N.W.2d 284, 288 (1965) (discussing the English law).

[68] *See, e.g.,* Gallagher v. Kemmerer, 144 Pa. 509, 22 A. 970, 970 (1891) (no joinder where independent acts caused pollution of stream); Sun Co. v. Wyatt, 48 Tex. Civ. App. 349, 107 S.W. 934, 935-36 (1908) (where no concert of action, defendants must be sued separately).

[69] *See, e.g.,* Meier v. Holt, 347 Mich. 430, 80 N.W.2d 207, 212 (1956) (second tortfeasor liable only for damages he caused); Frye v. City of Detroit, 256 Mich. 466, 239 N.W. 886, 887 (1932) (independent tortfeasors liable only for damages caused by their own negligence); *cf.* De Witt v. Gerard, 274 Mich. 299, 264 N.W. 379, 379 (1936) (plaintiff does not have to show which damages were caused by each tortfeasor, but is entitled to show by preponderance of evidence which damages each caused).

[70] *See* Wigmore, *Joint-Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress,* 17 ILL. L. REV. 458, 458-60 (1923) (denying recovery

Eventually, the rule in the United States evolved into the principle that, where the independent tortious acts of two or more persons contribute to the infliction of a single indivisible injury, such persons are to be joint tortfeasors, despite the lack of concerted action.[71] Some states, however, have rejected this modern trend[72] in favor of the proposition that there can be no joint and several liability in the absence of concerted action.[73] This group of reluctant jurisdictions heretofore included Mississippi.[74] Philosophically, the *D & W Jones* decision stands for the proposition that it is more just for any of several wrongdoers to pay damages for injuries separately caused than it is for the injured party to be denied full recovery.[75] In so holding, the Mississippi Supreme Court joins the modern trend of decisions.[76]

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because damages cannot be apportioned between independent tortfeasors amounts to injustice); Comment, *Joint Torts and Several Liability*, 17 Tex. L. Rev. 399, 420 (1939) (better rule would be to hold each tortfeasor wholly liable unless injury divisible). Dean Prosser argued that the first defendant, in a concurrently-caused injury, "remains the proximate cause of the injury, so long as the intervention of the second is a foreseeable, or normal, not extraordinary consequence, which fairly may be said to lie within the scope of the risk created." Prosser, *Joint Torts and Several Liability*, 25 Calif. L. Rev. 413, 433 (1937) (footnotes omitted). *See* Tackaberry v. Sioux City Servs. Co., 154 Iowa 358, 132 N.W. 945, 952 (1911) (where plaintiff cannot apportion damages between independent tortfeasors, he has no right of recovery in a joint action); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265, 268-69 (1920) (motion to set aside verdict should have been sustained where independent tortfeasors were joined in action).

[71] *See, e.g.*, Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337, 342-43 (Tenn. 1976) (right to sue independent tortfeasors in single suit where their negligent acts cause indivisible damages); Landers v. East Tex. Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731, 734 (1952) (same). *See generally* 45 Tenn. L. Rev. 129, 132-41 (1977) (discussing joint and several liability where injury indivisible). For a discussion of imposition of joint liability upon members of an industry for injury caused by defective product design where the specific manufacturer of the injury-causing product cannot be identified, see 42 U. Cin. L. Rev. 341 (1973).

[72] *See* note 69 *supra*.

[73] *See, e.g.*, Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265 (1920).

[74] *See* Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292 (1933).

[75] *See* note 70 *supra*.

[76] *See* note 71 and accompanying text *supra*. The court acknowledged that the allowing of joint and several liability without concerted action was the modern trend. 372 So. 2d at 294.

IV. COMMENCEMENT OF STATUTE OF LIMITATIONS IN STRICT PRODUCTS LIABILITY-PERSONAL INJURY ACTIONS

An issue before the Mississippi Supreme Court in *Ford Motor Co. v. Broadway*[77] was the time from which the general six-year statute of limitations[78] begins to run in personal injury actions grounded in strict products liability.[79] In *Broadway,* the plaintiff was injured as a result of the failure of a safety switch mechanism that was designed to keep his tractor from starting while in gear.[80] The plaintiff's injury occurred approximately ten years after he had purchased the tractor,[81] and suit was filed approximately four and one-half years after the injury had been sustained.[82] At trial, the court overruled the defendant's demurrer and affirmative defense that the action was barred by the expiration of the six-year limitation period.[83] On appeal, the Mississippi Supreme Court held that in personal injury actions based on strict products liability the six-year statute applies, but that it does not begin to run until the injuries are sustained.[84] The court noted that while some states have adopted a special statute of limitations for strict products liability actions,[85] Mississippi has not done so.[86] It concluded by placing the issue at the door of the legislature, stating that if the *Broadway* holding were not in accord with the legislature's views, then "it is the legislature's prerogative to change or amend the present statute or enact a new one applying specifically to strict products liability cases."[87]

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[77] 374 So. 2d 207 (Miss. 1979).

[78] MISS. CODE ANN. § 15-1-49 (1972) provides: "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after."

[79] 374 So. 2d at 208-09.

[80] *Id.* at 208.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 209. Although the court affirmed the lower court on this issue, the case was reversed and rendered since there was no evidence that the tractor left the defendant's hands in a defective condition unreasonably dangerous to the user. *Id.* at 211.

[85] *See, e.g.,* IND. STAT. ANN. § 34-4-20A-5 (Burns Supp. 1979) (two years after cause of action accrues); TENN. CODE ANN. § 28-304 (Supp. 1979) (one year after injury).

[86] 374 So. 2d at 209.

[87] *Id.*

As this issue was one of first impression in Mississippi, the court was required to examine by analogy previous decisions involving statutes of limitations applicable to other types of actions.[88] Those decisions stand for the proposition that the cause of action accrues from the date of the negligence or omission rather than from the date that damages are sustained or the negligence is discovered.[89] However, in *M. T. Reed Construction Co. v. Jackson Plating Co.,*[90] the court had reserved the question as to when the action accrues in cases of personal injury.[91]

In products liability law today, the limitations period typically does not begin to run until the plaintiff either sustains an injury or reasonably should have discovered that he had sustained an injury from a defective product.[92] In the narrower area of strict products liability, the general rule is that the accrual of the cause of action, which commences the running of the limitations period, occurs neither when the negligence itself takes place,[93] nor when the product in question is sold,[94] but when the injury or damage is sustained.[95] In determining when the running of the statute of limitations should commence in strict products liability actions, courts should "strike a balance between the necessity of providing the consumer with adequate time within which to discover a defect and institute an action, and the need to provide the manufacturer with a definite period of liability and a date on which his exposure to suit ends."[96] Although the *Broadway* decision does not provide manufacturers with a definite period of exposure to liability in strict products liability actions,[97] it nevertheless ensures an injured plaintiff that he will not be barred from recovery simply because the defect causing his injury did not manifest itself within six years.

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[88] *Id.* at 208.

[89] *See* M.T. Reed Constr. Co. v. Jackson Plating Co., 222 So. 2d 838, 841 (Miss. 1969) (Mississippi has not adopted the "know" or "ought to know" rule); Wilder v. St. Joseph Hosp., 225 Miss. 42, 48, 82 So. 2d 651, 652-53 (1955) (medical malpractice action accrues from date of injury, not from date of discovery); Johnson v. Crisler, 156 Miss. 266, 269, 125 So. 724, 725 (1930) (action for defective certificate of title accrues when title certified, not when damage occurs).

[90] 222 So. 2d 838 (Miss. 1969).

[91] *Id.* at 839.

[92] Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations,* 56 N.C.L. Rev. 663, 664 (1978). *See* Mack v. Clairol, Inc., 69 A.D. 2d 752, 415 N.Y.S.2d 16, 17 (1979) (limitation period begins to run from date of injury in strict liability cases); Holifield v. Setco Indus., Inc., 42 Wis. 2d 750, 168 N.W.2d 177, 180 (1969) (injury is required for limitation period to begin in strict liability cases).

[93] *See* Rosenau v. New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968) (negligent act in itself does not cause limitation period to run in strict liability cases).

[94] *See* Manning v. Altec, Inc., 488 F.2d 127, 130 (6th Cir. 1973) (suit filed one year after injury but over one year after purchase of product was timely and within one year limitation period).

[95] *See generally* Lerbman, *When the Product Ticks: Products Liability and Statutes of Limitations,* 11 Ind. L. Rev. 693, 716-24 (1978) (discussing approach to the balancing of equities); Phillips, *supra* note 92, at 672-75 (discussing policy considerations and statutes of limitations).

V. LEGISLATIVE ENACTMENTS

At first glance, it would appear that the most important legislative action taken with regard to tort law by the 1979 Mississippi Legislature was its extension of immunity from liability to all persons for the consequences of emergency assistance rendered in good faith and with reasonable care.[98] However, since the statutes do require "the exercise of reasonable care"[99] in the rendering of such aid, it appears that standard negligence arguments might still be available to a plaintiff in such a case. In another enactment of note, the legislature added podiatrists to the group of medical practitioners covered by the statute of limitations barring malpractice actions brought more than two years after the date on which the injury was or should have been discovered.[100] The final legislative enactment of interest in the area of torts was an amendment to the Mississippi Medicaid Law allowing a plaintiff to recover medical expenses paid by the state

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[96] 374 So. 2d at 209. For a commentary on a state legislature's response to judicial interpretation of statutes of limitations in strict products liability cases, see Comment, *The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns,* 1979 UTAH L. REV. 149.

[97] That is, the period will end six years after the date of injury, which is indeterminable. Manufacturers would like a definite cutoff date after the date of sale beyond which an action could not be brought. Phillips, *supra* note 92, at 664-72.

[98] Act of March 19, 1979, ch. 376, §§ 1-3, 1979 Miss. Laws 663 (amending MISS. CODE ANN. § 73-25-37 (1972) (physician liability); *id.* § 63-3-405 (duty of driver of vehicle involved in collision to render aid); *id.* § 59-21-55 (duty of boat operator to remain at scene of accident and render aid)).

[99] MISS. CODE ANN. §§ 59-21-55, 63-3-405, 73-25-37 (Supp. 1979).

[100] Act of March 5, 1979, ch. 347, 1979 Miss. Laws 605 (amending MISS. CODE ANN. § 15-1-36 (1972) (limitations for medical malpractice)).

Medicaid Commission as an element of special damages in a personal injury action.[101]

Nathan Dorlon Clark

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[101] Act of March 1, 1979, ch. 326, 1979 Miss. Laws 566 (amending Miss. Code Ann. § 43-13-125 (1972) (allowing recovery of medical expenses paid by Commission)).

RECENT DECISIONS

CONSTITUTIONAL LAW—REVERSE DISCRIMINATION—ELIMINATION OF RACIAL DISCRIMINATION IS A COMPELLING STATE INTEREST SUFFICIENT TO JUSTIFY THE MINORITY BUSINESS ENTERPRISES AMENDMENT

Plaintiffs[1] brought an action in the District Court for the Southern District of New York seeking a preliminary injunction[2] to prevent the Secretary of Commerce from enforcing the Minority Business Enterprises amendment of the Public Works Employment Act of 1977.[3] Plaintiffs alleged that the amendment's mandate of ten percent participation by minority business enterprises in any local, federally funded public works project[4] violated the equal protection clause[5] and the 1964 Civil Rights Act.[6] The trial court dismissed the complaint, holding that the M.B.E. amendment was in compliance with both the United States Constitution and Title VI of the Civil Rights Act of 1964.[7] Because of the history of past racial discrimination in the construction industry, the Second Circuit affirmed the trial court and concluded that the M.B.E. amendment established an affirmative action program that neither violated the civil rights of nonminority members, nor deprived them of the equal protection of the law.[8] On writ of certiorari the United States Supreme Court, *held*, affirmed. The use of racial and ethnic criteria as a condition in the M.B.E. amendment constitutes a valid means of achieving permissible objectives within the scope of Congress' spending power and does not, on its face, violate the equal protection clause. *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980).

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[1] Plaintiffs were several associations of contractors and subcontractors as well as a firm engaged primarily in heating, ventilation and air conditioning. Fullilove v. Klutznick, 100 S. Ct. 2758, 2763 (1980).

[2] Plaintiffs' request for a temporary restraining order was denied. The hearing on the application for preliminary injunction to prevent enforcement of the M.B.E. provision was consolidated with the trial on the merits. *Id.* at 2763.

[3] 42 U.S.C. § 6705(f)(2) (Supp. II 1978).

[4] The M.B.E. provision states:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

Id.

[5] U.S. CONST. amend. XIV, § 1. For the text of the equal protection clause, see note 12 *infra.*

[6] 42 U.S.C. §§ 2000d, 2000d-1 (1976). For the text of Title VI of the Civil Rights Act of 1964, see note 52 *infra.*

[7] Fullilove v. Kreps, 443 F. Supp. 253, 262 (S.D.N.Y. 1977), *aff'd,* 584 F.2d 600 (2d Cir. 1978), *aff'd sub nom.* Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

The fourteenth amendment to the United States Constitution,[9] passed shortly after the Civil War,[10] was designed to eliminate invidious racial discrimination.[11] Although the scope of the equal protection clause[12] now encompasses more than racial discrimination,[13] the initial interpretation by the Supreme Court was much more limited.[14] In 1873 in the *Slaughter House Cases*,[15] the Court concluded that the history precipitating passage of the fourteenth amendment indicated that this provision was limited to the benefit of the black race.[16] Although the Supreme Court abandoned this restrictive interpretation of the clause as early as 1886,[17] it was not until 1944, in *Korematsu v. United States*,[18] that race was held to be a "suspect class"[19] deserving the "most rigid scrutiny."[20]

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[8] Fullilove v. Kreps, 584 F.2d 600, 609 (2d Cir. 1978), *aff'd sub nom.* Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

[9] U.S. CONST. amend. XIV.

[10] The fourteenth amendment was first proposed in January, 1866. Congress passed the amendment in June, and two years later ratification was completed. R. HARRIS, THE QUEST FOR EQUALITY 32 (1960). For an extensive discussion of the passage of the fourteenth amendment, see H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956).

[11] *E.g.*, Germann v. Kipp, 429 F. Supp. 1323, 1331 (W.D. Mo. 1977), *vacated as moot*, 572 F.2d 1258 (8th Cir. 1978). *See generally* J. TENBROEK, EQUAL UNDER LAW 193-222 (Collier ed. 1965) (contending that the equal protection clause was designed to ensure absolute equality). Some historians argue that the framers' original understanding of the equal protection clause cannot be determined with accuracy. *See* Frank & Munro, *The Original Understanding of "Equal Protection of the Law,"* 50 COLUM. L. REV. 131, 138-40 (1950) (asserting that the original meaning of "equal protection" is unclear because of the term's lack of history prior to incorporation in the fourteenth amendment). Some legal scholars maintain that "equal protection" was not originally intended to grant absolute equality. *See* R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 167 (1977) (contending that the purpose of equal protection was to eliminate racial discrimination only with respect to enumerated privileges in the Constitution). *See also* L. LUSKY, BY WHAT RIGHT? 214 (1975) (asserting that the framers never intended for "inequality" to include social isolation of minority groups).

[12] U.S. CONST. amend. XIV, § 1. The equal protection clause of the fourteenth amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." While the fourteenth amendment prohibits only state denial of equal protection, the fifth amendment's due process clause has been held to be co-extensive with equal protection under the fourteenth amendment. *E.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[13] *See, e.g.*, *In re* Griffiths, 413 U.S. 717, 729 (1973) (applying equal protection to invalidate the exclusion of resident aliens from law practice); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (extending equal protection to classifications based on sex).

[14] *See* Slaughter House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (limiting the scope of

One of the major areas of equal protection litigation involved the segregated school systems in the South.[21] In 1896 the Court determined in *Plessy v. Ferguson*[22] that "separate but equal"[23] facilities did not violate the Constitution.[24] The *Plessy* Court refused to accept the proposition that separate accommodations for black and white train passengers necessarily implied that blacks were inferior.[25] In 1954, however, the Court took a diametrically opposite stance in *Brown v. Board of Education*.[26] The precise issue presented in *Brown* was the constitutionality of "separate but equal" school systems,[27] which the

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equal protection to the black race).

[15] *Id.* at 81.

[16] *Id.*; *accord*, Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880) (contending that the purpose of the fourteenth amendment was to secure the civil rights of blacks).

[17] *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (extending equal protection to Chinese). While the Supreme Court did begin to extend fourteenth amendment rights to different racial classifications, each racial group constituted a minority. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 478 (1954) (Mexican-Americans); Korematsu v. United States, 323 U.S. 214, 216 (1944) (Japanese); Truax v. Raich, 239 U.S. 33, 43 (1915) (Austrian resident aliens).

[18] 323 U.S. 214 (1944).

[19] *Id.* at 216.

[20] *Id.*

[21] *See* Brown v. Board of Educ., 347 U.S. 483, 487-88 (1954) (challenging the validity of separate school systems for blacks and whites under the equal protection clause).

[22] 163 U.S. 537 (1896).

[23] *Id.* at 550.

[24] *Id.* at 551.

[25] The Court concluded that if separation of the races inflicted a sense of inferiority on the black race, it was "not by reason of anything found in the act, but solely because the colored race choses [sic] to put that construction upon it." *Id.* In his dissent in *Plessy*, Justice Harlan was very critical of the majority's holding, stating: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.* at 559.

[26] 347 U.S. 483 (1954).

[27] *Id.* at 487-88. The Court noted that judicial sanction of separate but equal educational facilities had originated in Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206 (1850), a pre-fourteenth amendment case in which school segregation was upheld in the face of a state constitutional challenge. 347 U.S. at 491 n.6.

Court held to be "inherently unequal."[28] In reaching this conclusion, the Court noted that separation on the basis of race connoted a sense of inferiority that affected a black child's motivation to learn.[29]

The Court's use of the equal protection clause to invalidate racially discriminatory practices[30] was not limited to school desegregation.[31] In *Loving v. Virginia*,[32] the Court was presented with a challenge to a law banning interracial marriage.[33] The Court reasoned that since a classification based on race was involved,[34] the Virginia law would be subjected to the most exacting standard of judicial review.[35] Under such strict scrutiny the Court determined that the government would be required to meet a two prong test before any classification based on race would be upheld.[36] First, the state was required to show a compelling state interest unrelated to race for making the classification.[37] In addition, the Court required that there be no reasonable alternative that would satisfy the governmental interest while imposing a lesser burden on the disadvantaged race.[38] Under this rigid test the Court held that the Virginia law violated the equal protection clause.[39]

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[28] 347 U.S. at 495. The Court reasoned that intangible factors must also be taken into consideration when determining whether separate facilities were in fact equal. Speaking for the majority, Chief Justice Warren concluded that separate school facilities denied black children the exchange of views and other educational opportunities available to white children. *Id.* at 492-94. *Cf.* McClaurin v. Oklahoma State Regents, 339 U.S. 637, 640-41 (1950) (restrictions requiring a black graduate student to sit in separate or adjoining sections impaired his ability to learn).

[29] 347 U.S. at 494. To support this conclusion, the Court cited various psychological studies. *Id.* at n.11.

[30] *Id.* at 491 n.6. *See also* Dunn, *Title VI, The Guidelines and School Desegregation in the South,* 53 VA. L. REV. 42, 42 (1967) (discussing the massive resistance to school desegregation in the South).

[31] Following *Brown*, the Court declared in per curiam opinions that segregation in other public facilities was unconstitutional as well. *See, e.g.,* New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, 54 (1958) (per curiam) (holding segregation in parks unconstitutional); Gayle v. Browder, 352 U.S. 903, 903 (1956) (per curiam) (buses); Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (per curiam) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877, 877 (1955) (per curiam) (beaches).

[32] 388 U.S. 1 (1967).

[33] *Id.* at 2. The case involved two Virginia residents, a black woman and a white man, who were married in the District of Columbia. They then moved to Virginia where they were arrested for violating the law forbidding interracial marriages. After pleading guilty, they were sentenced to one year in jail. The judge suspended the sentence provided the Lovings leave Virginia and not return together for 25 years. Virginia argued that the law was constitutional because the penalty for violation applied equally to blacks and whites. *Id.* at 8.

[34] *Id.* at 11. *Cf.* McLaughlin v. Florida, 379 U.S. 184, 192-93 (1964) (statute prohibiting interracial cohabitation held to create an invidious racial classification).

[35] 388 U.S. at 11. Rejecting the state's contention that the statutes should be upheld "if there is any possible basis for concluding that they serve a rational purpose," the Court determined that "equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes." *Id.* at 8-9.

[36] *Id.* at 11.

Perhaps no other judicial mandate was met with as much resistance[40] as the Court's order that the principles declared in *Brown*[41] be implemented "with all deliberate speed."[42] Nine years after the Court's decision that segregation in schools was unconstitutional, only slightly more than one percent of the black children in the South were attending desegregated schools.[43] In an effort to solve these implementation problems,[44] ratios were employed to achieve the required racial balance.[45] In *Swann v. Charlotte-Mecklenburg Board of Education*[46] the Supreme Court upheld this limited use of ratios as a remedy for past racial discrimination.[47]

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[37] *Id.* The state alleged that it had a legitimate purpose "to preserve the racial integrity of its citizens" and to prevent "the corruption of blood." *Id.* at 7.

[38] *Id.* at 11.

[39] *Id. But cf.* Korematsu v. United States, 323 U.S. 214, 219-20 (1944) (wartime emergency held to be compelling state interest justifying discrimination against Japanese).

[40] *See generally* Dunn, *supra* note 30, at 42 n.2 (discussing the voluminous legislation enacted in the South to thwart school desegregation).

[41] *See* notes 26 through 30 and accompanying text *supra.*

[42] Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (*Brown II*).

[43] SOUTHERN EDUCATION REPORTING SERVICE, STATISTICAL SUMMARY OF SCHOOL SEGREGATION-DESEGREGATION IN THE SOUTHERN AND BORDER STATES 29 (1965).

[44] Following the *Brown* mandate to desegregate, the Court was called upon to affirm that decision when the resistance of officials in Little Rock, Arkansas, led to violence. *See* Cooper v. Aaron, 358 U.S. 1, 16-17 (1958) (holding that constitutional rights cannot be nullified openly, directly or indirectly). Little Rock was not alone in its efforts to avoid implementation. Prince Edward County, Virginia, attempted to avoid desegregation by closing all of the public schools and providing grants to white children to attend private schools. *See* Griffin v. Prince Edward County School Bd., 377 U.S. 218, 229-32 (1964) (county's abandonment of public schools in opposition to desegregation held unconstitutional). Some Southern school districts that had adopted rezoning plans sought to frustrate compliance by allowing students to transfer to another school if their designated school was attended predominantly by children of the opposite race. *See, e.g.*, Monroe v. Board of Comm'rs, 391 U.S. 450, 458-59 (1968) (invalidating a free transfer plan); Goss v. Board of Educ., 373 U.S. 683, 687 (1963) (declaring minority-to-majority transfers unconstitutional). Another common method of postponing implementation was the freedom of choice plan, but in 1968 the Court held that freedom of choice did not produce racially desegregated school systems as mandated by *Brown*. Green v. County School Bd., 391 U.S. 430, 441-42 (1968). After three years in the New Kent County School system, no white child had chosen to attend a school that was formerly black, and only about 15% of the black children had elected to attend the traditionally all-white schools. *Id.* at 441. Speaking for the unanimous Court, Justice Brennan stated: "The burden on the school board today is to come forward with a plan that promises realistically to work, and promises to work now." *Id.* at 439.

However, the Court's case-by-case approach to solving the implementation problems proved inadequate[48] and Congress enacted the Civil Rights Act of 1964[49] as an alternative to judicial enforcement.[50] Included in that Act are Titles VI and VII,[51] which prohibit respectively racial discrimination in federally funded programs[52] and discriminatory employment practices.[53] In the wake of these explicit pronouncements, the question of the validity of affirmative action[54] programs provoked much litigation.[55]

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[45] *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971) (ordering the busing of children in order to achieve required racial balance); McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (same); Davis v. Board of School Comm'rs, 402 U.S. 33, 38 (1971) (same). *But see* Milliken v. Bradley, 418 U.S. 717, 752 (1974) (holding an interdistrict remedy unavailable in the absence of an interdistrict violation). For a discussion of the use of race-conscious programs in areas outside of the school desegregation context, see notes 54, 74 and accompanying text *infra.*

[46] 402 U.S. 1 (1971).

[47] *Id.* at 25. Originally, the Supreme Court drew a distinction between the remedies available for de jure and de facto segregation. *See id.* at 17-18 (differentiating between de jure and de facto segregation). In the South, where de jure segregation existed, the Court ordered racial ratios and interdistrict busing in order to achieve desegregation. *See* notes 45, 46 and accompanying text *supra.* In some of the larger Northern cities desegregation precipitated massive white flight from the inner city, where blacks were concentrated, to the suburbs. *See* Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (holding that continued segregation as a result of white flight is not grounds for further federal intervention). Where de facto segregation existed, the Court refused to order interdistrict remedies absent a showing of past racial discrimination. *See* Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (concluding that without an interdistrict violation there is no cause for an interdistrict remedy). *But cf.* Hills v. Gautreaux, 425 U.S. 284, 306 (1976) (ordering multiple area relief to remedy a Title VI violation). In 1973 the Court abandoned this approach to desegregation and determined that if a school board program affected the pattern of discrimination, then the remedies traditionally applied in the South could be applied even without a background of state-mandated segregation. Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 208-09 (1973). For a criticism of the de jure-de facto distinction, see *id.* at 217-53 (Powell, J., concurring). *See also* DEVELOPMENTS IN THE LAW—EQUAL PROTECTION, 82 HARV. L. REV. 1065, 1184-86 (1969) (discussing the development of de jure segregation).

[48] There were over 2,000 legally segregated school districts in the South. SOUTHERN EDUCATION REPORTING SERVICE, *supra* note 43, at 29. For a detailed discussion of the problems of desegregation in the South, see Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact,* 36 GEO. WASH. L. REV. 824 (1968).

[49] Pub. L. No. 88-352, 78 Stat. 245 (codified at 42 U.S.C. §§ 2000a to 2000h-6 (1976)).

[50] *See Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary on H.R. 7152,* 88th Cong., 1st Sess., ser. 4 pt. II, at 1446-55 (1963) (statement of President John F. Kennedy). *See also* Dunn, *supra* note 30, at 43, 48-51 (discussing the background of Title VI).

[51] Civil Rights Act of 1964, §§ 601 and 703(a), 42 U.S.C. §§ 2000d and 2000e-2(a) (1976).

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[52] 42 U.S.C. § 2000d (1976) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284, 294-96 (1976) (construing Title VI as prohibiting a racially discriminatory housing program); Lau v. Nichols, 414 U.S. 563, 568 (1974) (Title VI construed as barring discrimination even when no purposeful design is present); Serna v. Portales Mun. Schools, 499 F.2d 1147, 1153-54 (10th Cir. 1974) (same). For a detailed discussion of Title VI, see Dunn, *supra* note 30; Comment, *supra* note 48.

[53] 42 U.S.C. § 2000e-2(a) (1976) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The statute defines "employer" as a "person" who is "engaged in an industry affecting commerce" who has "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year." *Id.* § 2000e(b). *See, e.g.*, McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273, 281 (1976) (construing Title VII to protect whites as well as blacks); Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) (interpreting Title VII to prohibit neutral employment practices that have a disproportionate effect); Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971) (requiring testing procedures for employment to be job-related). *See generally* 84 HARV. L. REV. 1109 (1971) (discussing employment discrimination); 12 GA. L. REV. 104 (1977) (discussing the development of Title VII).

[54] Affirmative action programs in employment have been sanctioned by the courts. *See, e.g.*, United States v. Wood, Wire, & Metal Lathers Local 46, 471 F.2d 408, 416 (2d Cir.) (ordering unions to grant immediate membership to minority applicants), *cert. denied*, 412 U.S. 939 (1973); Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir. 1971) (ordering the hiring of one minority worker for every two white workers hired), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir.) (ordering minority apprentices for each class of workers), *cert. denied*, 404 U.S. 984 (1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 132 (8th Cir. 1969) (ordering implementation of a minority recruitment program); Local 53, International Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969) (affirming matching referrals until specific objectives were met); Stamps v. Detroit Edison Co., 365 F. Supp. 87, 120-24 (E.D. Mich. 1973) (ordering 30% of total work force hired to be minority), *rev'd sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977). Official recognition of race has been upheld in a variety of other contexts as well. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971) (school desegregation); Otero v. New York City Hous-

The Supreme Court first addressed this question in *University of California Regents v. Bakke.*[56] The case involved the validity of the University of California Medical School's special admissions program,[57] which set aside sixteen of the one hundred acceptances for minority applicants.[58] The Court split 4-1-4 in reaching its decision.[59] Justice Powell, the "swing vote," opined that the strict scrutiny standard traditionally applied to minority classifications should apply equally to whites[60] and concluded that the admissions program was invalid.[61] However, four other Justices argued that a less than strict standard of review should be applied.[62] They reasoned that the program should be measured against the important governmental objective sought by the

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ing Auth., 484 F.2d 1122, 1139 (2d Cir. 1973) (public housing tenants); Porcelli v. Titus, 431 F.2d 1254, 1257 (3d Cir. 1970) (school administrators), *cert. denied*, 402 U.S. 944 (1971); Brooks v. Veto, 366 F.2d 1, 23 (5th Cir. 1966) (grand jury selection), *cert. denied*, 386 U.S. 975 (1967).

[55] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (upholding a voluntary affirmative action program initiated by a private employer); University of Cal. Regents v. Bakke, 438 U.S. 265, 320 (1978) (invalidating a special admissions program that set aside 16 acceptances for minority applicants). *See generally* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974) (discussing constitutional problems); Zimmer, *Reverse Discrimination: Will the Court Act to End the Second Reconstruction?*, 31 ARK. L. REV. 370 (1977) (discussing judicial actions unfavorable to reverse discrimination).

[56] 438 U.S. 265 (1978). The Court previously had rejected a similar challenge. *See* Defunis v. Odegaard, 416 U.S. 312, 319-20 (1974) (reverse discrimination challenge to a minority preference admissions program declared moot because of petitioner's imminent graduation).

[57] The Davis Medical School operated two admissions programs in selecting its freshman class. Applicants with an undergraduate grade point average of 2.5 were rejected under the regular program. However, the 2.5 cutoff did not apply to the special admissions program. 438 U.S. at 272-75. Applicants under the special program were admitted with lower grade point averages, Medical College Admission Test scores, and personal interview scores than achieved by Alan Bakke in both 1973 and 1974. *Id.* at 277 & n.7.

[58] *Id.* at 275. The special admissions program was limited to Negroes, Chicanos, Asians, and American Indians. *Id.* at 274.

[59] *Id.* at 271-72.

[60] *Id.* at 289-91. As stated by Justice Powell, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.* at 289-90. Discussing the degree of scrutiny to be applied, Justice Powell stated: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291.

[61] *Id.* at 319-20.

[62] *Id.* at 261-62.

special admissions program to determine if those objectives had been achieved.[63] Using this test, they determined that the program was valid.[64] The remaining Justices[65] limited their determination to the Title VI statutory challenge[66] without discussing the standard of judicial review applicable to majority classification.[67] Thus, the Court left unanswered the question of whether protection against "suspect" racial classifications should be extended to the white majority.[68] Since Justice Powell agreed that the special admissions program was invalid, Bakke was admitted to the Medical School.[69] However, since Justice Powell also agreed that some use of racial classification was permissible,[70] the *Bakke* decision is limited to the holding that affirmative action programs may not depend solely on quotas.[71]

The next challenge to affirmative action programs was brought before the Court in 1979 in *United Steelworkers v. Weber*.[72] In that case the Court determined that the Title VII statutory prohibition against racial discrimination[73] was not intended to forbid all race conscious affirmative action plans.[74] Rather, the majority concluded that the statutory purpose was to encourage employers to eliminate the last vestiges of racial discrimination in employment.[75] Consequently, the Court held that the voluntary affirmative action plan adopted by the private employer was permissible under Title VII.[76]

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[63] *Id.* at 361.

[64] *Id.* at 362.

[65] Justice Stevens, with whom Chief Justice Burger, Justices Rehnquist and Stewart joined, concurred and dissented. *Id.* at 408.

[66] *See* note 52 *supra.*

[67] 438 U.S. at 410-11.

[68] *See* notes 60 through 67 and accompanying text *supra.*

[69] 438 U.S. at 320.

[70] *Id.*

[71] In his opinion, Justice Powell concluded: "In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.*

[72] 443 U.S. 193 (1979).

[73] *See* note 53 *supra.*

[74] 443 U.S. at 208. It should be noted that § 706(g) entitles courts which find an intentional violation of § 703(a) to enjoin the action or to order "such affirmative action as may be appropriate." 42 U.S.C. § 2000e-5(g) (1976). An extensive list of cases imposing quotas or goals under § 706(g) is set forth in Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023, 1034-35 (D. Vt. 1977).

[75] 443 U.S. at 208.

[76] *Id.* at 209.

As a result of the limited holdings in *Bakke* and *Weber*, congressional statutes ordering affirmative action programs[77] have come under recent attack from whites alleging reverse discrimination.[78] One example is the Minority Business Enterprises amendment[79] to the Public Works Employment Act of 1977,[80] which was designed to increase the federal funding previously allocated for local public works projects.[81]

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[77] Congress has authority under the enabling clauses of the thirteenth and fourteenth amendments to remedy discriminatory practices. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5. The Court has recognized that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (holding unconstitutional a Civil Service Commission regulation barring resident aliens from employment).

[78] *See, e.g.*, Rhode Island Chapter, Associated Gen. Contractors of America v. Kreps, 450 F. Supp. 338, 367 (D.R.I. 1978) (refusing to grant an injunction against enforcement of the M.B.E.); Montana Contractors' Ass'n v. Secretary of Commerce, 460 F. Supp. 1174, 1179 (D. Mont. 1978) (holding the M.B.E. to be unconstitutional), *appeal dismissed*, 442 U.S. 935 (1979); Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023, 1041 (D. Vt. 1977) (M.B.E. amendment declared unconstitutional as applied to small minority population); Carolinas Branch, Associated Gen. Contractors v. Kreps, 442 F. Supp. 392, 400 (D.S.C. 1977) (preliminary injunction against enforcement of M.B.E. amendment denied). *See also* Kilgore, *M.B.E. Funding in the Construction Industry: A Constitutional Question of Reverse Discrimination*, 30 LAB. L.J. 289, 289-94 (1979) (discussing recent constitutional challenges to the M.B.E. amendment).

[79] *See* note 4 *supra*.

[80] Public Works Employment Act of 1977, § 103(f)(2), 42 U.S.C. § 6705(f)(2) (Supp. I 1977).

[81] In 1976 Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999 (codified at 42 U.S.C. §§ 6701-6735 (1976)). The purpose of the L.P.W. was twofold: "(1) to alleviate the problem of national unemployment, and (2) to stimulate the national economy by assisting State and local governments to build badly needed public facilities." H.R. REP. No. 94-1077, 94th Cong. 2d Sess. 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 1746-47. Congress appropriated $2 billion for implementation of the L.P.W. 42 U.S.C. § 6710 (1976). The program was to be administered by the Secretary of Commerce through the Economic Development Administration (EDA). The Secretary was to make a final determination of applications received within 60 days. *Id.* § 6706. Failure to take action within the 60 day period was deemed to be approval. If the funds were available, labor was to begin on the site of the project within 90 days of approval by the Secretary. *Id.* § 6705(d). Unemployment in the construction industry remained high, however. *See* H.R. REP. No. 95-20, 95th Cong., 1st Sess. 3, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 150, 151-52. Thus, Congress enacted the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (amending 42 U.S.C. §§ 6701-6735 (1976)), and appropriated an additional $4 billion for public works. Pub. L. No. 95-29, 91 Stat. 123 (codified at 42 U.S.C. § 6710 (Supp. I 1977)). Attempting to avoid delay, Congress restricted consideration of applications to those submitted to the Secretary before December 31, 1976. 42 U.S.C. § 6707(h)(1) (Supp. I 1977).

The M.B.E. provision[82] was intended ostensibly to remedy the practice of awarding only one percent of all governmental contracts to minority businesses.[83] Simply stated, the M.B.E. amendment requires that at least ten percent of the grants expended under the P.W.E.A. be "set aside" for minority businesses.[84] Recently, the constitutionality of this provision[85] came under attack from associations of general contractors,[86] but was upheld by the Third and Sixth Circuits.[87]

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[82] The M.B.E. provision was introduced as an amendment during the floor debate on the Public Works Employment Act. 123 Cong. Rec. H1,436 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). The amendment was later brought up in the Senate on March 10, 1977. 123 Cong. Rec. S3,910 (daily ed. March 10, 1977) (remarks of the Presiding Officer).

[83] In introducing the amendment, Representative Mitchell (D.-Md.) identified a compelling need to provide remedial action for minority businesses which traditionally had been excluded from the construction industry. 123 Cong. Rec. 1437-38 (1977) (statement of Hon. Parren J. Mitchell). *But see* Montana Contractors' Ass'n v. Secretary of Commerce, 460 F. Supp. 1174, 1177 n.6 (D.C. Mont. 1978) (statements made in one house by a partisan declared to be nondeterminative of a congressional finding sufficient to justify racial classification), *appeal dismissed*, 442 U.S. 935 (1979).

[84] *See* note 4 *supra*. The Secretary was given the authority to enact rules and regulations necessary to carry out the provisions of the P.W.E.A. 42 U.S.C. § 6706 (Supp. I 1977). Pursuant to that authority, the Secretary promulgated regulations which provided:

> (b) . . . (1) No grant shall be made under this part for any project unless at least 10 percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises. (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the 10 percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

13 C.F.R. § 317.19(b) (1979).

[85] The M.B.E. amendment required that at least 10% of the funds expended under the P.W.E.A. go to minority business enterprises. *See* note 4 *supra*.

[86] *See, e.g.*, Rhode Island Chapter, Associated Gen. Contractors of America v. Kreps, 450 F. Supp. 338, 366-67 (D.R.I. 1978) (denying a preliminary injunction against enforcement of M.B.E.); Carolinas Branch, Associated Gen. Contractors v. Kreps, 442 F. Supp. 392, 400 (D.S.C. 1977) (same). *But see* Associated Gen. Contractors v. Secretary of Commerce, 441 F. Supp. 955, 969 (C.D. Cal. 1977) (holding the M.B.E. to be inconsistent with Title VI), *vacated and remanded*, 438 U.S. 909, *aff'd on remand*, 459 F. Supp. 766 (C.D. Cal. 1978); Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023, 1041 (D. Vt. 1977) (holding the M.B.E. provision unconstitutional as applied to the facts).

[87] *See* Ohio Contractors Ass'n v. Economic Dev. Adm'n, 452 F. Supp. 1013, 1023 (S.D. Ohio 1977) (refusing an injunction against enforcement of the M.B.E. amendment), *aff'd*, 580 F.2d 213 (6th Cir. 1978); Constructors Ass'n v. Kreps, 441 F. Supp. 936, 955 (W.D. Pa. 1977) (denying request for preliminary injunction), *aff'd*, 573 F.2d 811 (3d Cir. 1978).

In *Constructors Association v. Kreps*,[88] the Third Circuit affirmed the district court's refusal to grant a preliminary injunction against the Secretary of Commerce.[89] In its decision, the district court had noted that racial classifications had been sanctioned by the Supreme Court in a variety of contexts provided that the classifications served some remedial purpose.[90] The district court concluded that the M.B.E. was similarly intended to serve a remedial purpose.[91] Consequently, the court determined that the compelling state interest test was satisfied,[92] enabling the amendment to withstand even strict judicial review.[93]

The same result was reached in *Ohio Contractors Association v. Economic Development Administration*,[94] in which the Sixth Circuit upheld the district court's refusal to grant an injunction in a similar situation.[95] The traditional two prong test for judicial review of suspect classifications[96] was applied by the district court,[97] which concluded that the M.B.E. amendment served a compelling state interest[98] and was the least restrictive alternative under the circumstances,[99] thus constituting a permissible affirmative action program.[100]

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[88] 573 F.2d 811 (3d Cir. 1978), *aff'g* 441 F. Supp. 936 (W.D. Pa. 1977).

[89] 573 F.2d at 820.

[90] 441 F. Supp. at 947. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 347-48 (1977) (upholding consideration of race in devising remedies for private discrimination); United Jewish Organization v. Carey, 430 U.S. 144, 167-68 (1977) (recognition of race in reapportionment of voting districts upheld). Specific percentage goals and time tables for minority hiring have also been sanctioned by the courts. *See, e.g.*, Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154, 1164 (S.D. Ill. 1971) (upholding the Illinois Ogilvie Plan as an equitable means of promoting equal employment opportunity for minorities), *aff'd*, 471 F.2d 680 (7th Cir. 1972); Joyce v. McCrane, 320 F. Supp. 1284, 1292-93 (D.N.J. 1970) (upholding the integration of unions under the Newark Plan); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1003, 1008 (E.D. Pa. 1970) (upholding the Philadelphia Plan for hiring minorities in federally assisted construction projects), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907, 911 (1969) (upholding affirmative action intended to assure minority representation in the renovation of a community college under the Cleveland Plan), *cert. denied*, 396 U.S. 1004 (1970).

The discretionary power of public authorities to remedy past discrimination has been recognized as even broader than that of the judiciary. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (discretionary power of school authorities encompasses the ordering of prescribed ratios that would not be within the scope of judicial power absent a constitutional violation); *cf.* Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) (concluding that the judiciary need only discern a basis upon which a congressional enactment can be supported).

[91] 441 F. Supp. at 952. The court noted that the minorities listed in the M.B.E. amendment historically had been the victims of racial discrimination. Therefore, even though the court found the lack of legislative history to support the statute "troublesome," the remedial purpose was still discernible. *Id.*; *accord*, Ohio Contractors Ass'n v. Economic Dev. Adm'n, 452 F. Supp. 1013, 1022 (S.D. Ohio 1977) (lack of data supporting the legislative history of the M.B.E. does not preclude conclusion that prevention of racial discrimination was the reasonable premise), *aff'd*, 580 F.2d 213 (6th Cir. 1978).

[92] 441 F. Supp. at 954.

[93] *Id.*

[94] 452 F. Supp. 1013 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978).

In the instant case,[101] the Court[102] reasoned that while programs employing racial criteria call for "close examination,"[103] judicial restraint is required when interpreting congressional statutes.[104] Therefore, the Court found it necessary not only to ascertain the objectives sought by Congress in enacting the legislation, but also to determine whether the M.B.E. provision was a constitutionally permissible means of achieving those objectives.[105] Because the M.B.E. amendment was similar to other valid Congressional efforts to achieve equal economic opportunities for minorities,[106] the Court found that the objectives of the M.B.E. provision were within the scope of Congress' spending power.[107] Turning then to the question of "means," the Court noted that even remedial legislation must be "narrowly tailored" to achieve important governmental interests.[108] Although the federal courts have limited remedial powers,[109] the Court emphasized that the Constitution expressly granted Congress remedial authority to ensure equal protection of the law.[110] Rejecting the contention that Congress must act in a "color-blind" fashion in promulgating remedial legislation,[111] the Court determined that the M.B.E. provision was neither underinclusive[112] nor overinclusive.[113] Noting that the program could not be

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[95] On appeal, the Sixth Circuit concluded that "the district court did not abuse its discretion in declining to issue a preliminary injunction" against enforcement of the M.B.E. amendment. 580 F.2d at 214.

[96] The district court reasoned that statutes which imposed racial quotas traditionally had been subjected to the most exacting standard of judicial review. Under such strict scrutiny, the court noted that the challenged legislation must serve a compelling state interest by the least burdensome means available. 452 F. Supp. at 1022.

[97] *Id.* at 1021.

[98] The court noted that elimination of past or present racial discrimination was a compelling state interest. It concluded that there was sufficient evidence of past discrimination against minority contractors to justify the classification established by the M.B.E. amendment. *Id.* at 1021-22.

[99] *Id.* at 1023.

[100] The court observed that the Office of Minority Business Enterprises and the Small Business Administration had failed to increase minority participation in the construction industry. *Id.* at 1023 n.8. Since less restrictive alternatives had failed to eliminate racial discrimination in governmental contracting, the court concluded that the quota imposed by the M.B.E. amendment was a reasonable alternative intended to accomplish minority participation in the construction industry. *Id.* at 1022-23. *But see* Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023, 1041 (D. Vt. 1977) (holding the M.B.E. provision unconstitutional as applied to small minority population).

[101] Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

[102] The judgment of the Court was announced by Chief Justice Burger, who was joined by Justices White and Powell. *Id.* at 2762. Justice Powell filed a separate opinion concurring in the judgment. *See* note 116 *infra.*

[103] 100 S. Ct. at 2771.

[104] *Id.* at 2772.

[105] *Id.*

[106] The Court noted that the sponsors of the M.B.E. amendment had "expressly linked" the program to such existing programs as § 8(a) of the Small Business Act of 1958. *Id.* at 2767.

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[107] In reaching this conclusion, the Court used a three prong analysis. First, the plurality noted that the commerce power could have been the basis for regulating the actions of private prime contractors receiving federal funds. *Id.* at 2773. *See* U.S. CONST. art. I, § 8, cl. 3. Similarly, the fourteenth amendment could have been used as the basis for regulating state and local grantees. 100 S. Ct. at 2775. Comparing the M.B.E. program with the federal program in Lau v. Nichols, 414 U.S. 563 (1974), the Court concluded that the M.B.E. program "primarily regulates state action in the use of federal funds sought and accepted by grantees subject to statutory and administrative conditions." 100 S. Ct. at 2775.

[108] 100 S. Ct. at 2776.

[109] *Id.* at 2777.

[110] As stated by Chief Justice Burger:

> It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

Id.

[111] *Id.* at 2776-77.

[112] The Court noted that the M.B.E. program was not an attempt to grant preferential treatment to a nondisadvantaged group, but rather to confer upon the minority groups equal status with regard to public contracting opportunities. *Id.* at 2778. Absent a showing of invidious discrimination by the Congress in excluding identifiable minority groups suffering from similar discrimination, the Court refused to declare the M.B.E. program underinclusive. *Id.* at 2778-79.

[113] The Court determined that the M.B.E. provision provided reasonable assurance that the use of racial and ethnic criteria would be limited to the achievement of the remedial objectives. *Id.* at 2779. The waiver and exemption provisions were particularly significant in this respect. As stated by the Court, the fundamental assumptions underlying the M.B.E. provision included:

> (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past

held unconstitutional simply because it affected innocent nonminority firms,[114] the Court determined that a "sharing of the burden"[115] by nonminority firms was permissible, and upheld the validity of the M.B.E. provision.[116]

In a separate opinion concurring in the judgment of the Court,[117] Justices Marshall, Brennan and Blackmun reasoned that the appropriate analysis for remedial racial classifications consisted of a two prong test. First, the Court must determine whether the objectives of the legislation serve an important governmental interest.[118] If so, then the judiciary must look to see if the means selected by Congress are substantially related to the achievement of those objectives.[119] Reasoning that sufficient evidence indicated a history of past discrimination in the construction industry,[120] the Justices found that the M.B.E. provision would remedy this past and present discrimination.[121] The concurrence

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> discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

Id.

[114] *Id.* at 2778.

[115] Using a similar rationale to conclude that the burden of being denied preference would be minimal, the Second Circuit noted that the P.W.E.A. added $4 billion to the remaining $200 million appropriated through the Local Public Works Capital Development and Investment Act of 1976. *See* note 81 *supra*. This amounted to approximately 2.5% of the total funds spent on construction in the United States. Fullilove v. Kreps, 584 F.2d 600, 607 (2d Cir. 1978). The M.B.E. amendment required only 10% minority participation. Therefore, the M.B.E. provision would extend to only one-fourth of one percent of the funds expended yearly. *Id.* The 1972 census figures indicated that only 4.3% of the total number of firms in the construction industry were owned by minorities. Consequently, the "sharing of the burden" would mean that the .25% preferential treatment would be spread among nonminority businesses constituting 96% of the industry. *Id.* at 608.

[116] 100 S. Ct. at 2781-82. Concurring in the opinion of the Court, Justice Powell opined that the strict standard of judicial review enunciated by his opinion in *Bakke* was equally applicable to the instant case. *Id.* at 2783. Recognizing that Congress has the authority under the thirteenth and fourteenth amendments to "select reasonable remedies" to eliminate invidious discrimination, Justice Powell noted that the means selected by Congress could be upheld only when equitable and "reasonably necessary" to erase the discrimination. *Id.* at 2791. He concluded that the M.B.E. provision was a reasonably necessary means of eliminating intentional racial discrimination in the industry and was therefore valid. *Id.* at 2794.

[117] *Id.* at 2795.

[118] *Id.* at 2796.

[119] *Id.*

[120] *Id.*

[121] *Id.*

concluded that the means selected by Congress were substantially related to the achievement of the meaningful equality sought by the M.B.E. provision.[122]

Justice Stewart, joined by Justice Rehnquist in dissent,[123] maintained that any official action that made race a criterion was inherently suspect and operated as a denial of equal protection.[124] Reasoning that the Constitution granted Congress no greater authority to eradicate racial discrimination than was granted to the judiciary,[125] Justice Stewart concluded that a racial classification could be upheld only where its sole purpose was to remedy actual "illegal" racial discrimination.[126] Finding that the M.B.E. provision served objectives other than the elimination of invidious racial discrimination,[127] the dissenters argued that the provision did not comply with the strictures of the equal protection clause.[128]

The Court's holding in the instant case gives judicial sanction to a "set aside" provision established by Congress to remedy past and present racial discrimination in the construction industry.[129] While this decision may appear to contradict the Supreme Court's decision in *Bakke*,[130] the two cases can be distinguished easily.

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[122] *Id.* at 2797.

[123] *Id.* at 2798. Justice Stevens wrote a separate dissenting opinion. *See* note 128 *infra.*

[124] 100 S. Ct. at 2798.

[125] *Id.* at 2800. *See* note 77 *supra.*

[126] 100 S. Ct. at 2801.

[127] The legislative history of the M.B.E. indicated that it served at least two other objectives. First, it assured minority contractors 10% of federally funded public works contracts. Second, it compensated for "social, educational, and economic disadvantage." *Id.*

[128] *Id.* at 2802. In a separate dissenting opinion, Justice Stevens contrasted the M.B.E. legislation with other permissible remedial measures, such as the Voting Rights Act of 1965, concluding that the Court should not uphold the M.B.E. amendment as a remedial measure. *Id.* at 2810. Noting that the amendment created automatic preference on a nationwide scale for a diverse racial group without any consideration for geographic areas in which the contracts would be performed, Justice Stevens failed to see how the legislation removed previous barriers or worked to prevent the erection of new barriers in the economic arena. *Id.* In conclusion, Justice Stevens stated that congressional legislation establishing racial classifications that would be subjected to strict scrutiny had they been formulated by state legislatures should be analyzed on the basis of a judicial examination of the "procedural character of the decision making process." *Id.* at 2812. Since there was insufficient legislative history to support Congress' preference of minorities because of their inability to compete in the industry, Justice Stevens found the amendment invalid. *Id.* at 2814.

[129] *See* notes 79 through 88 and accompanying text *supra.*

[130] *See* notes 56 through 71 and accompanying text *supra.*

The Court's decision in *Bakke* addressed a racial preference program that had been imposed under color of state law absent a showing of any past racial discrimination at the medical school,[131] which clearly was not the situation in the instant case.[132] Congress has authority under the enabling clauses of the thirteenth[133] and fourteenth amendments[134] to enact legislation intended to remedy racial discrimination.[135] Even though there is very little legislative history to support a finding of past racial discrimination in the construction industry,[136] documented evidence available in other congressional records provides sufficient support for concluding that Congress enacted the M.B.E. provision as a remedial measure.[137] Therefore, the *Bakke* decision cannot be used as the basis for prohibiting congressionally mandated affirmative action programs.

While the facts in the instant case are more than sufficient to justify the Court's decision,[138] several questions are left unanswered. First, and perhaps foremost, is the question of whether or not Congress has the authority to impose discriminatory racial preferences in industries in which there is an absence of any history of past racial discrimination. In the instant case there was sufficient evidence available in other congressional records to support a history of discrimination in the construction industry.[139] However, the question remains how much, if any, detailed legislative history is required before Congress has authority to establish a minority preference system. Eventually, past societal discrimination will be insufficient to justify continued legislative preference of one racial group over another.

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[131] The Davis Medical School opened in 1968. Initially, the school operated without a special admissions program for minority applicants, accepting applicants regardless of race, on the basis of undergraduate grades, admission test scores and personal interview scores. As a result, no blacks, Mexican-Americans or American Indians were admitted. University of Cal. Regents v. Bakke, 438 U.S. 265, 272 (1979). Therefore, the special admissions program was initiated by the Davis Medical School. It was designed by the faculty to increase representation of "disadvantaged students" in medical school. *Id.* Justice Powell noted that racial classifications had never been upheld by the Court absent a judicial, legislative, or administrative finding of past racial discrimination. *Id.* at 307. As stated by Justice Powell: "[T]he purpose of helping certain groups whom the faculty . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.* at 310.

[132] The M.B.E. was introduced as an amendment to the P.W.E.A. during floor debate. *See* notes 81 through 86 and accompanying text *supra*.

[133] U.S. Const. amend. XIII, § 2.

[134] *Id.* amend. XIV, § 5.

[135] *See* note 77 *supra*.

[136] *See* Montana Contractors' Ass'n v. Secretary of Commerce, 460 F. Supp. 1174, 1177 n.6 (D.C. Mont. 1978) (contending that the statements made during passage of the M.B.E. do not constitute a legislative history sufficient to support finding of a remedial purpose behind enactment of the M.B.E.).

[137] *See* 100 S. Ct. at 2763-71.

[138] *Id.*

The second significant question left unanswered concerns the degree of judicial scrutiny to be applied to constitutional challenges alleging reverse discrimination. The lower courts have been left in a state of confusion as a result of the Supreme Court's inability to decide whether or not the white majority constitutes a "suspect class."[140] Instead of eliminating confusion in this area of the law, the decision in the instant case only clouds the issue further. The statement by Chief Justice Burger that this opinion should not be interpreted as an adoption of any of the "formulas of analysis"[141] set forth in *Bakke*[142] epitomizes the confusing state of the law in this area. While Chief Justice Burger refused to label the degree of judicial review employed, he did analyze the issue presented under the same test articulated by Justice Marshall.[143] Only time will reveal whether this "objectives-means" test will become the formula of analysis applied to reverse discrimination challenges in general. In light of the decisions in *Bakke* and *Weber*,[144] the instant case can only lead to continued litigation. While facts in the instant case are sufficient to justify the result,[145] these two questions pose significant issues which the Court will ultimately be called upon to resolve.

M. Susan Ivy

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[139] *Id.*

[140] *See* notes 60 through 68 and accompanying text *supra.*

[141] 100 S. Ct. at 2781.

[142] *See* notes 56 through 71 and accompanying text *supra.*

[143] 100 S. Ct. at 2772. Justice Marshall argued that the standard of review should be the objective-means test first enunciated in his opinion in *Bakke. Id.* at 2796.

[144] *See* notes 56 through 76 and accompanying text *supra.*

[145] *See* notes 72 through 100 and accompanying text *supra.*

LANDLORD AND TENANT—EXPRESS EXCULPATORY PROVISION THAT DOES NOT CONTRAVENE PUBLIC POLICY IS VALID AND IS TO BE GIVEN FULL EFFECT

Plaintiff[1] brought suit in the Circuit Court of Lincoln County against defendants[2] to recover damages resulting from a breach of a commercial lease contract.[3] The lease contract contained both a covenant of tenantability[4] and an exculpatory provision.[5] Based on the contention that the exculpatory clause was a complete defense to plaintiff's allegations,[6] defendants entered a special plea in bar.[7] The circuit

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[1] Plaintiff, Irene Smith, was the lessee-assignee of a lease agreement for commercial property in a shopping center. Smith v. Smith, 375 So. 2d 1041, 1042 (Miss. 1979).

[2] Defendant lessors, Dennis I. Smith and Hugh C. Norton, doing business as Brookway Shopping Center, entered into the five-year lease with plaintiff's assignors. *Id.* at 1042.

[3] Plaintiff's merchandise and other property on the demised premises were damaged, allegedly due to a leaky roof. Despite plaintiff's repeated complaints about the defective condition, the lessors not only failed to repair the roof but later ordered plaintiff from the premises. Consequently, plaintiff also sought the expenses incurred in the move. *Id.*

[4] The covenant, referred to by dissenting Justice Sugg as a covenant to repair, provided:

> Lessors shall maintain and keep in a tenantable condition the roofing and foundation of the building located on the hereinabove described premises and the exterior walls. All other maintenance, repairs or remodeling, of any kind or character shall be made by Lessees at their own expense; however, no such repairs, alterations, or remodeling shall be made without prior written permission of Lessors. It is further agreed that Lessees shall assume the responsibility of complete interior maintenance of said building.

Id.

[5] The provision stated:

> It is agreed that Lessors shall not be liable or responsible in any way for any damages to persons or property sustained in or about the demised premises during the term of this lease or any renewal thereof regardless of how same may be caused, and Lessees at all times, agree to indemnify and save harmless Lessors from all losses, damages, liabilities and expenses for any damage to person or property sustained in or about said demised premises during the term of this lease or any renewal thereof.

Id.

[6] *Id.*

[7] *Id.* Though pleas in bar were abolished by MISS. CODE ANN. § 11-7-59 (1972), the statute provides that:

> if matter which heretofore could constitute a plea be set up in the answer in such a manner as to be clearly distinct and readily separable and go to the

court sustained the plea.[8] On appeal to the Mississippi Supreme Court, *held,* affirmed. An express exculpatory provision in a commercial lease that does not contravene the public policy of the state and is the product of neither unequal bargaining power nor overreaching by the lessor is valid and must be given full effect. *Smith v. Smith,* 375 So. 2d 1041 (Miss. 1979).

The property lease arrangement originated in England as a contract between a landowner and his tenant.[9] By the sixteenth century, the lease had evolved into the conveyance of an estate or interest in real property for a specified length of time.[10] Subsequently, the common law definition of a lease was adopted by many American jurisdictions,[11] including Mississippi.[12] The modern lease, however, is regarded as both a conveyance and a contract;[13] it is a conveyance creating an estate for a term in the lessee-tenant, and a contract containing the covenants of the respective parties.[14] In form, a lease is a conveyance,

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> entire present cause of action, it may, on motion of either or any of the parties, be separately heard and disposed of before the principal trial of the cause, in the discretion of the court. . . .

[8] *Id.* at 1042. Furthermore, the lower court noted that the exculpatory provision in the lease contract was not contrary to state public policy, and that it was not an unreasonable exercise of the lessor's right to contract. *Id.*

[9] R. POWELL, THE LAW OF REAL PROPERTY ¶ 221[1], at 177 (1971). Historically, a lease was a security device to ensure the repayment of loans, but it soon evolved into a device whereby landowners contracted for the cultivation of their lands. *Id.* at 177-79. The tenant was "one who had no right in the land, merely the benefit of the contract." *Id.* at 179.

[10] *Id.* at 179; *see* 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 213-17 (3d ed. 1923) (evolution of lease in English history).

[11] 1 AMERICAN LAW OF PROPERTY § 3.11 (A. J. Casner ed. 1952); *see, e.g.,* Hendon v. McCoy, 222 Ala. 515, 133 So. 295, 296 (1931) (lease is a conveyance of property); DeVore v. Lee, 158 Fla. 608, 30 So. 2d 924, 925-26 (1947) (same); Williams v. Randolph & C. Ry., 182 N.C. 267, 108 S.E. 915, 918 (1921) (lease creates lesser estate from the whole).

[12] The Mississippi Supreme Court defines a lease as a conveyance or transfer of property. *See, e.g.,* Hurst v. English, 357 So. 2d 132, 134 (Miss. 1978) (lease operates as a conveyance of property for a specified period); Standard Fruit & S.S. Co. v. Putnam, 290 So. 2d 612, 615 (Miss. 1974) (lease is a conveyance of property); Rich v. Swalm, 161 Miss. 505, 516, 137 So. 325, 326-27 (1931) (same); Crowell v. New Orleans & N.E. R.R., 61 Miss. 631, 634 (1884) (lessee is owner for term of lease).

[13] C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 69 (1962). The Mississippi Supreme Court acknowledged this principle in Mississippi State Highway Comm'n v. Central Land & Rental Corp., 239 So. 2d 335 (Miss. 1970). "A lease is a conveyance of an estate in real property for a limited time with conditions attached." *Id.* at 337.

[14] 2 R. POWELL, *supra* note 9, at 184-85; 1 AMERICAN LAW OF PROPERTY, *supra* note 11 at § 3.11. *See generally* Note, *Contract Principles and Leases of Realty,* 50 B.U.L. REV. 24, 24-29 (1970) (property, contract principles of leases).

with its terms governed by the covenants between the lessor and the lessee.[15] This dual nature of leases gives rise to the unique blend of property and contract concepts that governs the landlord-tenant relationship.[16]

Since the lease traditionally was considered a conveyance of an interest in land, the basic premise underlying the landlord-tenant relationship was the common law doctrine of caveat emptor.[17] According to this doctrine, more properly referred to in this context as "caveat lessee,"[18] the lessee-tenant had the duty of inspecting the premises and assumed the risk as to the suitability of the property for his purposes.[19] Thus, no implied covenant of fitness accompanied the lease.[20] In an 1893 case, *Jones v. Millsaps*,[21] the Mississippi Supreme Court recognized the common law rule[22] and concluded that there was no implied covenant of fitness in a commercial lease.[23] The supreme court has consistently applied this rule to both commercial and residential leases,[24] despite the recent trend in some jurisdictions to infer a warranty of habitability in residential leases.[25]

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[15] 1 M. Friedman, Friedman on Leases § 1.1, at 1-10 (1974). For examples of covenants included in leases, see M. Friedman, Commercial Real Estate Leases 549-615 (1979 ed.).

[16] 2 R. Powell, *supra* note 9, at 187. *See generally* Lesar, *The Landlord-Tenant Relationship in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. Kan. L. Rev. 369, 371-77 (1961) (contract, property principles related to leases).

[17] 1 American Law of Property, *supra* note 11, at § 3.45. The tenant was regarded as the purchaser of an estate in land. *Id.*; *see, e.g.*, Bennett v. Sullivan, 100 Me. 118, 60 A. 886, 888 (1905) (common law rule of caveat emptor applicable to lease); Lavery v. Brigance, 122 Okla. 31, 242 P. 239, 241 (1925) (same). Many jurisdictions, however, have enacted statutes which abrogate the rule of caveat emptor with respect to residential leases. *See* Restatement (Second) of Property—Landlord and Tenant § 5, at 150-52 (1976) (list of statutes abrogating the rule).

[18] Comment, *In Search of a Habitable Home in Mississippi*, 49 Miss. L.J. 881, 882 (1978).

[19] *E.g.*, Valin v. Jewell, 88 Conn. 151, 90 A. 36, 38-39 (1914) (caveat lessee); Landt v. Schneider, 31 Mont. 15, 77 P. 307, 308 (1904) (same); Davis v. George, 67 N.H. 393, 39 A. 979, 980 (1893) (same); Whitcomb v. Brant, 76 N.J.L. 201, 68 A. 1102, 1103 (1908) (rule applied to commercial lease); Widmar v. Healey, 247 N.Y. 94, 159 N.E. 874, 874 (1928) (caveat lessee). *Contra*, Young v. Povich, 121 Me. 141, 116 A. 26, 28 (1922) (implied warranty of fitness in short-term residential lease); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286, 287 (1892) (same); Smith v. Marble, 11 M & W 5, 8-9, 152 Eng. Rep. 693, 694 (1843) (implied warranty of fitness in short-term lease of furnished premises).

[20] 1 American Law of Property, *supra* note 11, § 83.45, at 267; *cf.* Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 833, 131 So. 350, 355 (1930) (landlord's knowledge of tenant's purpose did not give rise to implied covenant of fitness). *But see* Sunasack v. Morey, 196 Ill. 569, 63 N.E. 1039, 1039-40 (1902) (landlord must disclose latent or concealed defects or dangerous conditions); Daly v. Wise, 132 N.Y. 306, 30 N.E. 837, 838 (1892) (landlord may be liable for damages arising out of fraudulent misrepresentation of premises); Restatement (Second) of Property, *supra* note 17, at § 17.1 (landlord liable for failure to disclose latent or concealed dangerous defects of which he has knowledge).

[21] 71 Miss. 10, 14 So. 440 (1893). The landlord, who retained control of the upper portion of the leased building, installed a defective water system which subsequently

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damaged the tenant's goods stored in the leased premises below. *Id.* at 10-11, 14 So. at 440.

[22] *Id.* at 18, 14 So. at 441.

[23] The court commented:

> The lessee cannot invoke an implied covenant of the landlord that the leased premises are fit and suitable for the lessee's business or use. The intending tenant must use his own faculties, and judge for himself if the premises he desires to lease are in repair, and are suitable for his use.

Id., 14 So. at 441.

[24] *See, e.g.*, Wilbourn v. Hardin, 234 So. 2d 606, 608 (Miss. 1970) (lessee examined property prior to leasing); Causey v. Norwood, 170 Miss. 874, 879-80, 156 So. 592, 593 (1934) (state committed to common law doctrine); Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 835, 131 So. 350, 355 (1930) (lessee could put building in proper condition); Green v. Long, 152 Miss. 117, 119, 118 So. 705, 706 (1928) (no implied covenant of fitness); *accord*, Foster v. United States, 214 F. Supp. 181, 184 (S.D. Miss. 1963) (no implied covenant of fitness).

[25] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079-80 (D.C. Cir.) (court inferred warranty of habitability in lease), *cert. denied*, 400 U.S. 925 (1970); Lemlee v. Breeden, 51 Hawaii 426, 462 P.2d 470, 474 (1969) (same); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526, 533-34 (1970) (same).

Under the common law rule there was no implied covenant that the leased residence was habitable. Hart v. Windsor, 12 M & W 86, 87-88, 152 Eng. Rep. 1114, 1122 (1843). In the United States, following the rule enunciated in Smith v. Marble, 11 M & W 5, 8-9, 152 Eng. Rep. 693, 694 (1843), several jurisdictions inferred a warranty of fitness, i.e., habitability, in short-term leases of furnished dwellings. *See, e.g.*, Young v. Povich, 121 Me. 141, 116 A. 26, 28 (1922) (implied warranty of fitness); Ackarey v. Carbonaro, 320 Mass. 537, 70 N.E.2d 418, 420 (1946) (same). *See also* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961) (sellers, real estate developers responsible for quality of product).

Subsequently, some state legislatures enacted housing codes to regulate the facilities supplied by the landlord and to abrogate the common law rule. *See* N.Y. MULT. DWELL. LAW §§ 1-367 (McKinney 1974). *See generally* Gribetz & Grad, *Housing Code Enforcement: Sanctions & Remedies*, 66 COLUM. L. REV. 1254, 1259-67 (1966) (discussion of housing codes and their enforcement). The Mississippi Legislature, recognizing the need to improve the quality of leased residential property, authorizes municipalities to adopt housing codes. MISS. CODE ANN. § 21-19-25 (1972). Typically, tenants must rely upon public officials to initiate the necessary proceedings for enforcement of the municipal housing codes. Comment, *supra* note 18, at 906-08.

The common law rule is also circumvented through the doctrine of constructive eviction, which theorizes in appropriate cases that the uninhabitable condition of the premises forced the tenant to vacate the premises. *E.g.*, Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268, 275 (1969) (court invoked doctrine of constructive eviction). Mississippi has recognized the doctrine of constructive eviction. *See, e.g.*, Perkins v.

Analogous to the doctrine of "caveat lessee" was the common law rule that a landlord had no obligation to repair or maintain the demised premises in the absence of an express covenant[26] or statutory

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Blackledge, 285 So. 2d 761, 764 (Miss. 1973) (jury instruction in suit for rent inadequate due to lack of reference to constructive eviction). *See generally* Rapacz, *Origin and Evolution of Constructive Eviction in the United States,* 1 DePaul L. Rev. 69 (1951) (innovative defense in suits for rent wherein the tenant quits the premises because of its uninhabitable condition).

In its analysis in Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079-80 (D.C. Cir. 1970), the court began with the proposition that a lease is a conveyance of an interest in land. *Id.* at 1074. However, the court recognized that:

> in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare rights to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance.

Id. (footnotes omitted).

Furthermore, the court noted that the modern tenant is not generally equipped with the same skills as his "agrarian predecessor." *Id.* at 1078. Therefore, it was clear that the common law rule was an anachronism in the context of residential urban leaseholds. The court cited three significant factors in abrogating the doctrine of caveat emptor: (1) the recognition that the historical factual assumptions which formed the basis for the doctrine were no longer valid; (2) the need to bring residential landlord-tenant law in line with recent decisions; and (3) the nature of the modern urban housing market. *Id.* at 1077. Consequently, the court concluded that there was an implied warranty of habitability in every residential lease, and that the Washington, D.C. Housing Code applied to all such leases. *Id.* at 1080.

Since the *Javins* decision, at least 36 jurisdictions have recognized the warranty of habitability. *See* Comment, *supra* note 18, at 887 n.48. *See also* Uniform Residential Landlord and Tenant Act §§ 1.102, 2.104, 4.104 (1972) (requires landlord to put premises in habitable condition). Mississippi has judicially abrogated the common law rule of caveat emptor in the sale of new homes. Brown v. Chalk, 358 So. 2d 721, 722 (Miss. 1978). Nevertheless, the court has continued to adhere to the general rule of caveat lessee with respect to leased property. *E.g.*, Hurst v. English, 357 So. 2d 132, 134 (Miss. 1978) (rule cited with approval).

For a more detailed discussion of the origins and development of the implied warranty of habitability, see generally Jaeger, *Apartments and Houses: The Warranty of Habitability,* 12 Akron L. Rev. 373 (1979); Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues,* 62 Cal. L. Rev. 1444 (1974); Note, *Javins v. First National Realty Corp.: Should We Follow the Leader?,* 42 Miss. L.J. 523 (1971).

[26] 3A G. Thompson, Commentaries on the Modern Law of Real Property § 1230, at 132, 134 (repl. 1959). The law concerning the lessor's obligation to repair the leased premises was founded on the concept of caveat emptor. 2 R. Powell, *supra* note 9, ¶ 233, at 330.69; *see, e.g.*, Grizzle v. Runbeck, 74 Ariz. 92, 244 P.2d 1160, 1162-63 (1952) (land-

duty.[27] The Mississippi Supreme Court initially embraced the common law no-repair rule in *Jones,*[28] after determining that the tenant could have negotiated a covenant to repair in the lease but failed to do so.[29] An exception to the *Jones* rule was announced in *Green v. Long,*[30] where the court imposed liability on a lessor who voluntarily repaired a leaky roof in a negligent manner.[31] Two years later, in *Marsh v. Serio,*[32] the court determined that a lessor's liability extended only to property damages which were the proximate result of the negligent repairs, and not to damages which resulted from the original defective condition.[33]

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lord not obligated for repairs made by tenant); Helm v. Leader, 217 Ky. 379, 289 S.W. 278, 279 (1926) (same); McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 359, 176 So. 395, 396 (1937) (rule of caveat emptor applies to tenants); Bushman v. Bushman, 311 Mo. 551, 279 S.W. 122, 126 (1925) (rule particularly valid when defects are due to passage of time); Levine v. McClenathan, 246 Pa. 374, 92 A. 317, 317 (1914) (no implied covenant for landlord to repair); *cf.* Davis v. Seay, 247 Ark. 396, 445 S.W.2d 885, 887-88 (1969) (where lease had no provision governing repairs tenant presumed to have effected repairs for his own benefit).

[27] *See* note 67 *infra.*

[28] 71 Miss. at 18, 14 So. at 441.

[29] The court noted:

> If he [lessee] wishes to protect himself against the hazards of subsequently occurring accidents or defects requiring repairs, he must do so by proper covenants in his contract of lease . . . . He cannot fix liability upon his lessor by some supposed implied covenant to repair, when he had it in his power to create this covenant expressly in the written contract, and failed to do so.

Id. at 18-19, 14 So. at 441; *cf.* Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 835, 131 So. 350, 356 (1930) (no implied covenant to repair even when building's condition violates statute). *But see* Taylor v. Gunn, 190 Tenn. 45, 227 S.W.2d 52, 55 (1950) (landlord must repair upon demand of public authority).

[30] 152 Miss. 117, 118 So. 705 (1928). Although the lease contained no covenant to repair, the lessor upon notification gratuitously repaired the leaky roof. As a result of the lessor's faulty repairs, the tenant's merchandise was damaged. *Id.* at 118, 118 So. at 705-06.

[31] *Id.* at 119, 118 So. at 706. The court predicated liability upon negligence rather than an implied covenant to repair. *Id.*, 118 So. at 706; *accord,* La Brasca v. Hinchman, 81 N.J.L. 367, 79 A. 885, 885 (1911) (liability predicated upon misfeasance); Marks v. Nambil Realty Co., 245 N.Y. 256, 157 N.E. 129, 130 (1927) (liability predicated upon negligence principles); RESTATEMENT (SECOND) OF TORTS § 362 (rev. ed. 1965) (landlord liable for negligent repairs). *See generally* Annot., 150 A.L.R. 1373 (1944) (collection of cases holding landlords liable for damages resulting from voluntary repairs negligently made).

[32] 156 Miss. 371, 126 So. 46 (1930). The commercial lessor orally agreed to repair the defective roof, undertook to do so, and was unsuccessful. *Id.* at 376, 126 So. at 47.

[33] *Id.* at 377, 126 So. at 48. The lessee was precluded from recovery because he failed to show that the alleged damages were proximately caused by the negligent repair work. *Id.*, 126 So. at 48.

In *Rich v. Swalm*,[34] the court, recognizing the contractual nature of a lease,[35] determined that the lessor's failure to perform his promise to make general repairs was an actionable breach of contract.[36] Nevertheless, the tenant was denied recovery for personal injuries because the court concluded that the plaintiff's damages were too remote to be included in a breach of contract suit, absent a showing of negligence or misfeasance.[37] Notwithstanding the *Rich* decision, in *Hodges v. Hilton*,[38] a subtenant recovered for personal injuries sustained on the leased premises.[39] *Rich*[40] was not controlling because the lessor in *Hodges* explicitly contracted to repair a known defective and dangerous condition for his tenant.[41] Failure to discharge the contractual duty was sufficient to sustain an action in tort for damages.[42] A later case, *Miller v. Miller*,[43] demonstrated that a lessor's limited covenant to repair did not obligate the lessor to rebuild the demised structure after its destruction by fire.[44]

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[34] 161 Miss. 505, 137 So. 325 (1931).

[35] *Id.* at 517, 137 So. at 327.

[36] *Id.* at 518, 137 So. at 327. After the lessee's initial inspection of the property, the lessor agreed to repair and paint the premises, and to maintain the house in first class condition. After making two minor repairs, the lessor reneged on his covenant and a boarder was injured on the defective steps. To induce the lessee to remain on the premises, the lessor renewed his agreement to repair. No repairs were made and the lessee was injured when the porch banister collapsed. *Id.* at 514-15, 137 So. at 326.

[37] *Id.* at 518, 137 So. at 327. *But cf.* Arledge v. Gulf Oil Corp., 578 F.2d 130, 132 (5th Cir. 1978) (federal court interpretation of Mississippi cases involving landlord's liability for injuries to tenant). The federal court in *Arledge*, construing and applying the law in *Rich*, concluded that if the lessor had agreed to make specific repairs, the Mississippi Supreme Court probably would find the lessor liable for personal injuries which were the result of the lessor's failure to perform his covenant.

[38] 173 Miss. 343, 161 So. 686 (1935).

[39] *Id.* at 349, 161 So. at 687. Prior to leasing the residential building, the lessee examined the premises and noted the defective condition of the upper rear porch. Upon notifying the lessor of the unsafe porch, the landlord contracted to put the porch in safe condition as partial consideration for the lease agreement. The lessee rented the upper rear premises to the plaintiff subtenant who later fell through the porch and was injured as a result of the lessor's failure to remedy the defective condition.
Id. at 347, 161 So. at 686-87.

[40] *See* notes 34 through 37 and accompanying text *supra*.

[41] 173 Miss. at 348, 161 So. at 687. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 17, § 18.2, at 256-57 (landlord liable to third party for negligent failure to perform covenant); RESTATEMENT (SECOND) OF TORTS, *supra* note 31, at § 357 (same).

[42] 173 Miss. at 349, 161 So. at 687. The court concluded that the negligent failure to discharge the covenant gave a right of action to one legally on the premises "in the tenant's right." *Id.*, 161 So. at 687. *Cf.* Hiller v. Wiley, 192 Miss. 488, 492, 6 So. 2d 317, 317 (1942) (sustaining suggestion of error from decision rendered in Hiller v. Wiley, 5 So. 2d 489 (Miss. 1942)) (where landlord neglected to maintain the common approach in a reasonably safe condition, tenant could recover for personal injuries).

[43] 217 Miss. 650, 64 So. 2d 739 (1953). The landlord covenanted to maintain the

Confronted a second time with an action by a tenant to recover for personal injuries resulting from a breach of the lessor's covenant to repair,[45] the court attempted to summarize the law in Mississippi regarding the lessor's liability for breach of the covenant.[46] After determining that the covenant in question[47] was a general repair covenant, as distinguished from a specific repair covenant,[48] the court held that the landlord was not liable for the lessee's personal injuries.[49]

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roof, foundation and outside surfaces of the buildings in good repair. *Id.* at 660, 64 So. 2d at 743.

[44] *Id.* at 660, 64 So. 2d at 744; *accord*, Miller v. Howard, 206 Md. 148, 110 A.2d 683, 685 (1955) (no duty to rebuild absent lessor's fault); Lebanon Prod. Credit Ass'n v. Feldhaus, 34 Abs. 70, 34 N.E.2d 463, 465 (Ohio App. 1938) (landlord-tenant relationship does not require landlord to provide new quarters). *Contra,* Fowler v. Payne, 49 Miss. 32, 76 (1873) (equating a covenant to repair with a covenant to rebuild); *but cf.* Abby v. Billups, 35 Miss. 618, 631-32 (1858) (tenant bound to rebuild under his covenant to repair).

[45] Ford v. Pythian Bondholders Protective Comm., 223 Miss. 630, 78 So. 2d 743 (1955). The tenant in a commercial building was injured when a pane of glass fell out of a window. *Id.* at 636-37, 78 So. 2d at 744. The tenant had never informed the lessor's agent of the window's defective condition. *Id.* at 638, 78 So. 2d at 745.

[46] The court stated:

> It thus appears that under our own decisions a landlord's breach of his covenant to repair generally the demised premises (as distinguished from an agreement to make specific repairs) does not render him liable for damages for personal injuries to the tenant or one in privity with him, unless it appears that at the time of the demise the premises contained, to the landlord's knowledge, dangerous hidden defects unknown to or concealed from the tenant, which the tenant could not have discovered by a reasonable inspection.

Id. at 645, 78 So. 2d at 749.

[47] The covenant in the commercial lease provided:

> The lessee hereby agrees with the lessor as follows:
>
> . . . .
>
> 2. To make no repairs or alterations on the premises without the written consent of the lessor.
>
> . . . .
>
> 5. To permit the lessor to enter and inspect the premises and make such repairs as may be deemed necessary by him.
>
> Minor surface repairs within space demised exclusively to lessee to be done by lessee; other repairs and changes, as required, to be done by lessor. Landlord shall make whatever structural changes, structural repairs, or repairs of structural defects as may be required.

Id. at 637-38, 78 So. 2d at 745.

[48] *Id.* at 646, 78 So. 2d at 749.

[49] *Id.*, 78 So. 2d at 749 (citing *Rich*). Though it was established at trial that the landlord had made some repairs to the window, no proof was presented as to repeated

In a later case, *Biloxi Realty Corp. v. Bittar,*[50] the supreme court held the lessor liable for damages to the lessee's merchandise that naturally and proximately resulted from the lessor's breach of his specific covenant to repair the roof.[51] However, a 1959 decision, *Wolff v. Mauceli,*[52] qualified *Biloxi Realty Corp.*[53] by holding that the lessor's actual or constructive notice of the needed repairs[54] was a prerequisite to liability on an express covenant to maintain the roof in good repair.[55]

After the *Hodges* decision,[56] the court had several additional opportunities to reconsider the lessor's duty to repair and his liability for injury to third parties.[57] In *Floyd v. Lusk,*[58] the commercial lease con-

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complaints from the tenant or as to negligence in the repairs. *Id.* at 647-48, 649, 78 So. 2d at 750. The court refused to adopt the principles set forth in the RESTATEMENT OF TORTS §§ 357, 362 (1934). 223 Miss. at 646, 78 So. 2d at 747, 749. *See generally* Annot., 78 A.L.R.2d 1238 (1961) (listing cases where the breach of lessor's agreement was the basis for imposing liability for personal injury).

[50] 227 Miss. 227, 86 So. 2d 14 (1956). The lessor explicitly covenanted to keep the roof in repair: "Party of the second part [tenant] does hereby accept said building as is and does hereby agree that any repairs, upkeep and improvements or replacements to said building shall be at his expense, excepting structural repairs and repairs to the roof of said store building. . . ." *Id.* at 230, 86 So. 2d at 14. As a result of heavy rains, the roof began to leak, causing the initial damage to the interior walls and to the lessee's merchandise. Upon receiving notice of the condition, the landlord negligently repaired the roof, and additional damage to the lessee's merchandise resulted. *Id.*, 86 So. 2d at 15. When it became apparent that the roof was beyond repair, the landlord ordered construction of a new roof. *Id.* at 233, 86 So. 2d at 16.

[51] *Id.* at 233-34, 86 So. 2d at 16. Recovery was allowed for all accrued property damages except those incurred prior to the first notification of the defect. Emphasis was placed on the landlord's ample notice of the defect and his opportunity to prevent the second wave of damages. *Id.*, 86 So. 2d at 16.

[52] Wolff v. Mauceli, 237 Miss. 378, 114 So. 2d 845 (1959).

[53] *See* notes 50, 51 and accompanying text *supra.*

[54] 237 Miss. at 384, 114 So. 2d at 848.

[55] The court concluded: "It is well settled under the authorities that where a landlord is obligated to make repairs during the term, actual or constructive notice of the need of repairs is necessary to put him in default of his obligation." *Id.*, 114 So. 2d at 848. Other jurisdictions require that the landlord have notice of the condition and have a reasonable time in which to make repairs. *E.g.,* Tyson v. Weil, 169 Ala. 558, 53 So. 912, 915 (1919) (notice or knowledge necessary); Kennedy v. Supnick, 82 Okla. 208, 200 P. 151, 152 (1921) (notice and a reasonable time to repair); Schenk v. Lamp, 229 Or. 72, 365 P.2d 1068, 1070 (1961) (must have reasonable time to repair). For cases in which the landlord was held liable for damages resulting from a defective roof, see Annot., 43 A.L.R. 1292 (1926).

[56] *See* notes 38 through 42 and accompanying text *supra.*

[57] *See* notes 58 through 66 and accompanying text *infra.*

[58] 190 So. 2d 451 (Miss. 1966). The plaintiff, a customer in the lessee's store, was injured when she fell on the defective steps. *Id.* at 452.

tained no provisions concerning repairs.[59] The court applied the *Jones* "no duty to repair" rule[60] and held that, absent proof that the landlord had created a nuisance, or was guilty of willful negligence, concealment, or fraud concerning defects on the premises,[61] he was not liable for a third party's injuries sustained on the demised premises which resulted from a defective condition.[62] However, in *Hurst v. English,*[63] the lease included a covenant by the lessor to keep the premises in good condition.[64] Since the landlord had not reserved the right to enter the premises to make general repairs,[65] and since he lacked actual or constructive notice that repairs were necessary, the court concluded that there was no dereliction of duty by the lessor.[66]

In an effort to circumvent the statutory and judicial imposition of the duty to repair,[67] shrewd lessors may insert exculpatory clauses into leases.[68] The primary function of any exculpatory provision in a lease is to exempt the lessor from all liability for injuries to persons and property resulting from the condition of the leased premises.[69] Though exculpatory provisions generally are held valid on the theory of freedom of contract,[70] some courts view the clauses with disfavor.[71] Frequently, the validity of the provision is predicated upon the court's finding that it does not contravene public policy,[72] that it is stated in clear and

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[59] *Id.* at 452.

[60] *See* notes 28, 29 and accompanying text *supra.*

[61] 190 So. 2d at 452 (citing Bailey v. Kelly, 86 Kan. 911, 122 P. 1027, 1028-29 (1912); 32 AM. JUR. *Landlord and Tenant* § 665 (1941); Annot., 110 A.L.R. 756 (1937)).

[62] 190 So. 2d at 452. As a general rule, the landlord is not liable for injuries to third parties where the tenant has no recourse against the landlord; third parties have no greater rights than the lessee. *Cf., e.g.,* Clary v. Hayes, 300 Ky. 853, 190 S.W.2d 647, 659 (1945) (third party must look to tenant); Brady v. Klein, 133 Mich. 422, 95 N.W. 557, 558 (1903) (no privity between landlord and third party); Beaulac v. Robie, 92 Vt. 27, 102 A. 88, 90 (1917) (look to tenant for remedy).

[63] 357 So. 2d 132 (Miss. 1978). Plaintiff brought an action as next of kin against the lessee and the lessor for an injury sustained by his son when a rusty door spring broke and hit the child in the eye. *Id.* at 133.

[64] The commercial lease contained the following clause: "Lessor shall as soon as possible and not later than 45 days from the above date, repair windows, doors, front of building, paint building and keep same in good condition for the life of this agreement." *Id.* at 133.

[65] *Id.* at 134.

[66] *Id.* (citing Wolff v. Mauceli, 237 Miss. 378, 114 So. 2d 845 (1959)). For an analysis of *Wolff*, see notes 52 through 55 and accompanying text *supra.* The court also concluded that the landlord "was not burdened with the duty to inspect the premises." 357 So. 2d at 134. *But see* Sargent v. Ross, 113 N.H. 388, 308 A.2d 528, 534 (1973) (abrogating the rule of nonliability of landlord for injuries sustained on residential property). For a discussion of the judicial imposition of tort liability on the landlord, see Note, *Lessor's Duty to Repair: Tort Liability to Persons Injured on the Premises,* 62 HARV. L. REV. 669 (1949).

[67] 2 R. POWELL, *supra* note 9, at ¶ 233[2]. Since the early 1900's, many jurisdictions have enacted legislation placing a nondelegable duty to repair on the lessor. *E.g.,* CONN. GEN. STAT. ANN. § 19-342 (West 1977) (formerly CONN. GEN. STAT. § 4049 (rev. ed. 1949)) (landlord has duty to repair); MONT. REV. CODES ANN. §§ 42-401 to -442 (Supp. 1977) (same). Despite the absence of such statutes, some courts have imposed a duty to repair on the landlord. *See, e.g.,* Sargent v. Ross, 113 N.H. 388, 308 A.2d 528, 533-34 (1973) (landlord should make repairs necessary to keep premises safe).

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[68] 2 R. POWELL, *supra* note 9, at ¶ 234[4]; Rehberg, *Exculpatory Clauses in Leases,* 15 GA. B.J. 389, 389-91 (1953).

[69] 6A A. CORBIN, CONTRACTS § 1472, at 600-01 (1962 ed.); 15 S. WILLISTON, CONTRACTS § 1751 (Jaeger ed. 1957). The RESTATEMENT OF CONTRACTS § 574 (1932) defines an exculpatory clause as "[a] bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm."

[70] The United States Supreme Court noted that "the highest public policy is found in the enforcement of the contract which was actually made." Sante Fe, P. & P. Ry. v. Grant Bros. Constr. Co., 228 U.S. 177, 188 (1913); *see, e.g.,* Strauch v. Charles Apts. Co., 1 Ill. App. 3d 57, 273 N.E.2d 19, 23 (1971) (exculpatory clause upheld on grounds of freedom of contract); Cannon v. Bresch, 307 Pa. 31, 160 A. 595, 597 (1932) (same). *See generally* Note, *Exculpatory Provisions in Leases: A Multi-Factor Analysis of Pennsylvania Supreme Court Decisions,* 40 TEMP. L.Q. 195 (1967) (reasons for validating exculpatory clauses in leases).

[71] *E.g.,* Middleton v. Lomaskin, 266 So. 2d 678, 680 (Fla. App. 1972) (exculpatory clauses not favored); Covington v. Brewer, 101 Ga. App. 724, 115 S.E.2d 368, 372 (1960) (same). *But cf.* Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425, 427 (1955) (generally, exculpatory provisions in commercial and business transactions are valid despite the fact that "the law does not favor a contract exempting a person from liability for his own negligence, as it induces a want of care").

[72] *E.g.,* Brady v. Glosson, 87 Ga. App. 476, 74 S.E.2d 253, 255 (1953) (does not contravene public policy); Clifton v. Charles E. Bainbridge Co., 297 P.2d 398, 400-02 (Okla. 1956) (same); Lerner v. Heicklen, 89 Pa. Super. 234, 237 (1926) (same). In Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963), the court identified six factors that are instrumental in determining the type of contract agreement in which an exculpatory clause is deemed void as against public policy:

> It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is

unequivocal terms[73] and that the parties are of equal bargaining power.[74] Some jurisdictions have concluded that exculpatory clauses in leases are void as against public policy,[75] and a number of legislatures have enacted statutes declaring such clauses void and unenforceable.[76] Furthermore, several jurisdictions that acknowledge the validity of such provisions have refused to enforce them under certain circumstances.[77] The only reference to exculpatory clauses by the Mississippi

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> placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Id. at 98-101, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38 (footnotes omitted).

[73] Middleton v. Lomaskin, 266 So. 2d 678, 680 (Fla. App. 1972) (exculpatory clause enforceable when such intent clear and unequivocal).

[74] *E.g.,* Jackson v. First Nat'l Bank, 415 Ill. 453, 114 N.E.2d 721, 726 (1953) (parties to commercial lease were of equal bargaining power); Midland Carpet Corp. v. Franklin Associated Properties, 90 N.J. Super. 42, 216 A.2d 231, 234-35 (1966) (exculpatory clause represents division of risk of loss); Gabl v. Alaska Loan & Inv. Co., 6 Wash. App. 880, 496 P.2d 548, 551 (1972) (parties to commercial lease of equal bargaining power). In Camp v. Roswell Wieuca Court Apts., 127 Ga. App. 67, 192 S.E.2d 499 (1972), the court determined that the exculpatory clause precluded recovery by tenants who signed the residential lease contracts. The court did, however, allow the action for damages by the nonsignatory tenants. 192 S.E.2d at 500. Equal bargaining power, in Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1972), included entering into the exculpatory contract in the commercial lease knowingly and willingly. Therefore, where the lessee possessed only one and a half years of high school education, and the lessor's agent neglected to point out and explain the exculpatory clause, the provision was unconscionable and void. 276 N.E.2d at 145-48. *See generally* Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation,* 37 COLUM. L. REV. 248 (1937).

[75] *E.g.,* Henrioulle v. Marin Ventures, Inc., 20 Cal. 3d 512, 518-19, 573 P.2d 465, 143 Cal. Rptr. 247, 251 (1978) (applying criteria of Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 98-101, 383 P.2d 441, 445-46, 32 Cal. Rptr. 33, 37-38 (1963), to an exculpatory clause in a residential lease); Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377, 379 (1941) (one cannot contract to relieve oneself of liability); Kean v. 34 W. 34th St. Corp., 190 Misc. 914, 75 N.Y.S.2d 498, 499 (1947) (exculpatory provision contrary to statute); McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 486 P.2d 1093, 1096-97 (1971) (void as against public policy in multiple dwelling leases). Nevertheless, at least one jurisdiction has indicated that the legislature must act before the court will find certain exculpatory clauses void as against public policy. Manius v. Housing Auth., 350 Pa. 512, 39 A.2d 614, 615-16 (1944) (upheld clause in housing authority lease).

[76] *E.g.,* DEL. CODE ANN. tit. 25, § 5515 (rev. 1974) (declared clause void); HAWAII REV. STAT. § 521-33 (1976) (same); ILL. REV. STAT. ch. 80, § 91 (Supp. 1979) (same); MASS. GEN. LAWS ANN. ch. 186, § 15 (West 1977) (same); N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1967) (same).

[77] Exculpatory clauses will not relieve one of liability where a statutory duty has been breached. *E.g.,* Hanna v. Lederman, 223 Cal. App. 2d 786, 36 Cal. Rptr. 150, 154 (1963) (clause not effective when one breaches statutory duty); Boyd v. Smith, 372 Pa. 306, 94 A.2d 44, 46 (1953) (same). Nor will the clause exempt the lessor from liability for

Supreme Court has been in connection with common carrier contracts, where the court has determined that exculpatory provisions are void as against public policy.[78]

With judicial cognizance of the contractual nature of a lease,[79] the law of contracts has become instrumental in the interpretation of leases and their various covenants.[80] A lease contract must be interpreted as a whole, giving a reasonable construction and effect to all its words and clauses.[81] Mississippi first employed the contract construction rule in *Wadlington v. Hill.*[82] There the court ruled that conflicting provisions in a property purchase contract were to be construed in the context of the entire instrument.[83] The court in *Copiah Hardware Co. v. Johnson*[84] applied the construction rules of contract law to a com-

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willful and wanton conduct. *E.g.*, Smith v. General Apt. Co., 133 Ga. App. 927, 213 S.E.2d 74, 76 (1975) (lessor's failure to change locks after notice that rapist terrorizing apartment complex had master key was willful and wanton conduct; clause ineffective). If the landlord's negligence creates a nuisance, liability will be imposed, despite the exculpatory provision. *E.g.*, Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425, 432 (1955) (exculpatory clause inapplicable when lessor's negligence amounts to creation and maintenance of nuisance); Godfrey v. Western Carolina Power Co., 190 N.C. 24, 128 S.E. 485, 493-94 (1925) (maintenance of pond and dam gave rise to actionable nuisance despite exculpatory clause). If the lessee-tenant did not sign the lease containing the clause, he is not bound by it and may recover. Camp v. Roswell Wieuca Court Apts., 127 Ga. App. 67, 192 S.E.2d 499, 500 (1972). For more on the validity of exculpatory clauses in leases, see 2 M. FRIEDMAN, *supra* note 15, at §§ 17.1-.3 (1978); Annot., 175 A.L.R. 83, at § 45 (1948).

[78] The Mississippi Constitution of 1890 provides that "[e]xpress, telegraph, telephone, and sleeping car companies are declared common carriers in their respective lines of business and subject to liability as such." MISS. CONST. art. 7, § 195. This provision has been construed to bar common carriers from escaping liability for negligence by means of exculpatory contracts. Western Union Tel. Co. v. Bassett, 111 Miss. 468, 471, 71 So. 750, 751 (1916).

[79] *See* notes 13, 14 and accompanying text *supra*.

[80] *See* notes 14 and 16 *supra*.

[81] RESTATEMENT OF CONTRACTS, *supra* note 70, at §§ 235, 236(a); 6 S. WILLISTON, *supra* note 70, at § 890A; *see, e.g.*, White v. Barton, 269 S.W.2d 673, 675 (Mo. Ct. App. 1954) (construing lease contract); Johnson v. Cheney Bros., 277 A.D. 656, 102 N.Y.S.2d 302, 302 (App. Div. 1951) (construing employment contract).

[82] 18 Miss. (10 S. & M.) 560 (1848). The case involved a conflict between a covenant to pay and a covenant to execute a warranty deed in a contract for the sale and purchase of land. *Id.* at 562.

[83] The court stated that "the general rule should be carefully regarded, that covenants are to be construed, as near as possible, by the obvious intention of the parties, which must be gathered from the whole context of the instrument, interpreted according to the reasonable sense of the words." *Id.* at 562.

[84] 123 Miss. 624, 86 So. 369 (1920).

mercial lease and its renewal covenant[85] and determined that the renewal covenant should be construed with reference to the entire agreement.[86] The court in *Hines Motor Co. v. Hederman*,[87] in interpreting the "retake" and renewal clauses of the commercial lease in controversy, reiterated the maxim that a lease is to be viewed as a whole. Thus, it has become a well-settled rule in Mississippi that a contractual writing is to be construed as a whole, giving reasonable effect and meaning to all provisions.[88]

Two lines of authority have developed concerning the effect of the exculpatory clause in a lease as an affirmative defense to a suit against the lessor for damages. In *Jersey Silk & Lace Stores, Inc. v. Best Silk Shops, Ltd.*,[89] the court held that the lessee had no cause of action for damage to his merchandise[90] since the exculpatory provision exempted the lessor from liability for such damages.[91] Treating the lease as a contract,[92] the court determined that the exculpatory clause[93] barred an action based on a breach of the covenant to repair.[94] In a similar case, *Swisscraft Novelty Co. v. Alad Realty Corp.*,[95] it was stated that the covenant to repair the roof and the exculpatory clause were "separate and distinct."[96] The court, acknowledging the general rule of the validity of exculpatory clauses in commercial leases,[97] held that the clause imposed an insurable risk on the tenant.[98] Consequently, the clause barred the tenant's action for the initial damages sustained.[99] Alternatively, in refusing to apply the exculpatory clause as a bar in *Kelley Realty Co. v. Botsford,*[100] the court determined that the lease contract must be construed as a whole.[101] Therefore, the existence of the exculpatory clause was no reason to ignore the lessor's express covenant to repair leaks,[102] and the lessor's covenant supported the action for damages notwithstanding the exculpatory provision.[103]

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[85] The renewal clause gave the lessee the right "to renew the lease for one year at a time before or after November 1, 1918, as long as they may desire to do so." *Id.* at 633-34, 86 So. at 369.

[86] *Id.* at 634, 86 So. at 369.

[87] 201 Miss. 859, 867, 30 So. 2d 70, 72 (1947).

[88] *E.g.*, Pfisterer v. Noble, 320 So. 2d 383, 384 (Miss. 1975) (applied to mineral lease); Texaco, Inc. v. Kennedy, 271 So. 2d 450, 452 (Miss. 1973) (construed lease with an option to purchase clause); Hewitt v. Frazier, 219 So. 2d 149, 153 (Miss. 1969) (applied to equipment purchase contract); Byrd v. Rees, 251 Miss. 876, 883, 171 So. 2d 864, 867-68 (1965) (applied to contract for sale of business); Granberry v. Mortgage Bond & Trust Co., 159 Miss. 460, 467-68, 132 So. 334, 335 (1931) (construed deed of trust); Yazoo & Miss. Valley R.R. v. First Nat'l Bank, 119 Miss. 59, 64, 80 So. 382, 383 (1918) (all parts of contractual writing should be harmonized); Harris v. Townsend, 101 Miss. 590, 597, 58 So. 529, 529 (1912) (same); *accord*, Bartlett & Co., Grain v. Merchants Co., 323 F.2d 501, 506 (5th Cir. 1963) (applied to shipping contract); Delta Food Processing Corp. v. Greyson Co., 363 F. Supp. 382, 386 (N.D. Miss. 1973) (applied to equipment lease).

[89] 134 Misc. 315, 235 N.Y.S. 277 (1929).

[90] The lessee sued the landlord to recover the value of stored silk that was ruined when water leaked through the roof. 235 N.Y.S. at 279.

[91] *Id.* at 281.

[92] *Id.*

[93] The provision expressly exempted the landlord from liability for leakage. *Id.* at 279.

[94] The court determined that the only feasible theory of liability was breach of covenant to repair the roof. *Id.* at 281. However, the court indicated that the exculpatory provision would not have barred an action to recover the reasonable cost of repairs or to obtain diminution in rent. *Id.*

[95] 113 N.J. Super. 416, 274 A.2d 59 (1971). Lessee sued for damages to his personal

In the instant case, the majority[104] reasoned that since there was neither evidence of unequal bargaining power between the parties nor

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property caused by a leaking roof. After the first incidence of water damage, the lessee promptly notified the lessor of the defective roof and was assured the condition would be remedied. The roof was repaired only after the lessee had sustained additional water damage to the property. 274 A.2d at 61.

[96] 274 A.2d at 63.

[97] "In the context of a commercial or industrial lease, where the language is plain and unambiguous and the transaction is unaffected by public interest or unequal bargaining power, . . . no problem ordinarily exists as to the validity of an exculpatory provision in a lease agreement." *Id.* at 62.

[98] *Id.* at 63. The court noted that the exculpatory clause "in no way attenuates the landlord's contractual covenants to repair." *Id.*

[99] *Id.* at 64. The matter was remanded for a determination of the nature of the landlord's subsequent negligence. *Id.* at 65. *Accord,* Carter v. Noe, 118 Ga. App. 298, 163 S.E.2d 348, 349 (1968) (exculpatory clause bars action for property damage arising out of breach of covenant to repair); Book Prod. Ind., Inc. v. Blue Star Auto Stores, Inc., 33 Ill. App. 2d 22, 178 N.E.2d 881, 888 (1961) (same).

[100] 201 Ala. 506, 78 So. 860 (1918). The lessee sought to recover for property damages caused by the lessor's failure to repair leaks as covenanted. 78 So. at 860.

[101] 78 So. at 861. The court stated that it was "required to construe the contract as a whole." *Id.*

[102] The court reasoned:

> The covenant [to repair] . . . is the last covenant in the lease, and forms a separate and distinct clause thereof. To hold that this clause would not support this action would be to wholly ignore it, and certainly it was not intended by the parties to be a wholly meaningless, useless appendix to the lease contract, to be cut off, should it ever cause trouble.

Id.

[103] *Id.*; *accord,* Gilson v. Gillia, 45 Tenn. App. 193, 321 S.W.2d 855, 863 (1958) (exculpatory clause no bar to property damages suit predicated on breach of covenant to repair).

[104] The majority included Justices Broom, Cofer, Lee, Smith and Walker. 375 So. 2d at 1043. Chief Justice Patterson took no part in the decision. *Id.*

of overreaching on the part of the lessor,[105] and since the lease contract did not contravene public policy,[106] the exculpatory clause was valid.[107] Furthermore, since the exculpatory provision was an apportionment of the risk involved,[108] and since making repeated complaints to the lessor was the only attempt by the lessee designed to remedy the defective roof,[109] the lessee had to assume liability for the damages.[110] Finally, since the exculpatory clause was incorporated in the contract of both parties,[111] the clause, given its full effect, barred the lessee's suit.[112]

Dissenting Justice Sugg, joined by Justices Bowling and Robertson,[113] attacked the majority's opinion.[114] He argued that since a lease is a contract, according to well-established rules of construction,[115] such a contract is to be given a fair and reasonable interpretation,[116] with all provisions to be given full effect, if possible.[117] Furthermore, since a line of authority contrary to the majority's position advocated a different tack—reading the conflicting provisions together,[118] Justice

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[105] *Id.*

[106] *Id.*

[107] *Id.* (citing Swisscraft Novelty Co. v. Alad Realty Corp., 113 N.J. Super. 416, 274 A.2d 59 (1971)). For a discussion of *Swisscraft Novelty Co.*, see note 97 *supra.*

[108] The court noted "the exculpatory and indemnity provision of the lease was a division of the risk involved, fully understandable and advisable when the landlord reserves no control over the type and value of the inventory of the tenant." 375 So. 2d at 1042.

[109] *Id.* at 1043. The majority noted that the lessee "suffered her property and inventory to be exposed to the water from the roof." *Id.*

[110] *Id.*

[111] *Id.* at 1042.

[112] *Id.* at 1043. The majority noted that other remedies, such as a suit for specific performance of the covenant or for diminution in rent, were available to the plaintiff. *Id.*

[113] *Id.*

[114] *Id.* at 1043-44.

[115] *Id.* at 1043.

[116] *Id.* at 1043 & n.2 (citing Granberry v. Mortgage Bond & Trust Co., 159 Miss. 460, 467-68, 132 So. 334, 335 (1931); Citizens Bank v. Frazier, 157 Miss. 298, 302, 127 So. 716, 717 (1930)).

[117] 375 So. 2d at 1043 & n.2 (citing Yazoo & Miss. Valley R.R. v. First Nat'l Bank, 119 Miss. 59, 64, 80 So. 382, 383 (1918); Harris v. Townsend, 101 Miss. 590, 597, 58 So. 529, 529 (1912)).

[118] 375 So. 2d at 1044. To illustrate the alternative rationale, Justice Sugg discussed the decision in Kelley Realty Co. v. Botsford, 201 Ala. 506, 78 So. 860 (1918), and Gilson v. Gillia, 45 Tenn. App. 193, 321 S.W.2d 855 (1958). In both cases, involving facts similar to the instant case, the courts concluded that the covenants to repair would support an action for damages resulting from a breach, notwithstanding the exculpatory provisions. Kelley Realty Co. v. Botsford, 78 So. at 861; Gilson v. Gillia, 321 S.W.2d at 863. In reaching its decision, the Alabama court in *Kelley Realty* stated that it was necessary to construe the lease in its entirety. 78 So. at 861; *see* note 102 *supra.*

Sugg advocated the interpretation of the lease contract so as to effectuate both provisions.[119] Since the parties obviously did not intend the covenant to repair to be a meaningless appendage to the lease,[120] and since the covenant was surely not to be disregarded upon the lessor's failure to perform,[121] the dissenting justice concluded that the covenant to repair was relevant notwithstanding the presence of an exculpatory clause in the lease agreement.[122] Accordingly, since a more reasonable interpretation of the lease contract was to construe the exculpatory provision as exempting the landlord from all liability except for those damages wholly consequent upon the landlord's breach of covenant,[123] Justice Sugg concluded that the covenant to repair would support the tenant's cause of action.[124]

The decision in the instant case further complicates an already incongruous situation. Heretofore, the court's tendency was to employ any technicality to absolve the landlord from liability for his breach of a covenant to repair.[125] The court in *Smith* had an ideal opportunity[126] to articulate a precise rule concerning the liability of the landlord for his breach of covenant.[127] However, the majority chose to sidestep the question, sanctioning the application of a previously unmentioned lease contract provision[128] as a bar to the suit for damages.[129]

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[119] Sugg stated, "In my opinion, the contract should be construed to give effect to both the covenant by the landlord to repair and the covenant by the tenant to save the landlord harmless from damages." 375 So. 2d at 1043.

[120] *Id.* at 1044. Justice Sugg quoted the passage set forth in note 103 *supra.*

[121] 375 So. 2d at 1044.

[122] *Id.* at 1043-44.

[123] *Id.* at 1043. Justice Sugg considered "the exculpatory clause to save the landlord harmless from liability for damages, from whatever cause, except damages caused by failure of the landlord to perform his express covenant to keep the roof in a tenantable condition." *Id.*

[124] *Id.* at 1044.

[125] *See* notes 28 through 66 and accompanying text *supra.*

[126] The facts of the instant case included a lessor's general covenant to repair, ample notice by the lessee to the lessor of the defective condition, and failure on the part of the lessor to perform his covenant. *See* notes 1 through 6 *supra.*

[127] Considering Wolff v. Mauceli, 237 Miss. 378, 384, 114 So. 2d 845, 848 (1959) (landlord is in default of his contractual obligation to repair where he has actual or constructive notice of the need to repair yet fails to act), Biloxi Realty Corp. v. Bittar, 227 Miss. 227, 233, 86 So. 2d 14, 16 (1956) (landlord liable for failure to exercise due diligence), and Rich v. Swalm, 161 Miss. 505, 518, 137 So. 325, 327 (1931) (landlord liable for acts of negligence and misfeasance), it was reasonable to infer the landlord's liability for the property damage ensuing from the breach of covenant. *See* notes 32 through 37, 50 through 55 and accompanying text *supra.*

[128] In prior Mississippi case law exculpatory clauses were mentioned only in conjunction with common carrier contracts and the constitutional provision concerning the

Although the instant decision undoubtedly was influenced by the great weight of authority in other jurisdictions,[130] the practical effect of the majority's determination was to nullify a landlord's covenant to repair, provided the lease contained a valid exculpatory clause. By way of implication, the majority gave renewed impetus to the *Jones* rule.[131] Viewing the instant decision in light of established precedents[132] indicates that Mississippi continues to adhere to the doctrine of "caveat lessee." It was unfortunate, however, that the majority announced such a decisive rule without giving more substance to its decision.[133]

The dissent's interpretation of the conflicting lease provisions as construed with the document as a whole[134] produced a more equitable solution. The general covenant to repair in the instant case[135] did not obligate the landlord to inspect the premises:[136] therefore, the landlord could not be placed in default of his covenant to repair until he had received either actual or constructive notice of the defective condition.[137] However, once the landlord had notice, failure to perform his contract was actionable.[138] Consequently, following the dissent's rationale,[139] it was reasonable that the exculpatory clause,[140] read in conjunction with the covenant to repair, should be implemented to relieve the landlord of liability for the initial damages since he had no notice of the defective condition. However, as to subsequent damages wholly resulting from the landlord's failure to remedy the defect upon notice, the exculpatory provision should not be construed to relieve the landlord of liability.

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liability of common carriers. *See* note 78 *supra.*

[129] 375 So. 2d at 1043.

[130] *See* notes 67 through 74 and accompanying text *supra.*

[131] *See* note 28 and accompanying text *supra.* The *Jones* decision established two doctrines that the Mississippi Supreme Court has repeatedly applied to suits arising out of the landlord-tenant relationship: these are the rules of caveat lessee and the rule that a landlord has no obligation to repair absent a specific covenant or statutory command to do so. See notes 21 through 23, 28, 29 and accompanying text *supra.* Although the lessee followed the recommendation of *Jones,* negotiating a covenant to repair with the landlord, the majority in *Smith* allowed the landlord to escape liability by means of an exculpatory provision in the lease agreement. 375 So. 2d at 1042-43.

[132] *See* notes 28 through 66 and accompanying text *supra.*

[133] *See* notes 104 through 112 and accompanying text *supra.*

[134] *See* notes 115 through 123 and accompanying text *supra.*

[135] *See* note 4 *supra.*

[136] *See* notes 64 and 66 *supra.*

[137] *See* notes 50 through 55, 63 through 66 and accompanying text *supra.*

[138] *Id.*

[139] *See* note 123 and accompanying text *supra.*

[140] *See* note 5 *supra.*

In view of the conflicting lease provisions and established precedent, Justice Sugg's approach to the construction of the lease contract afforded an equitable resolution. Unfortunately, the majority announced a one-sided rule which undoubtedly will encourage the widespread inclusion of exculpatory clauses in various other contracts. An extension of the majority's holding in the instant decision to an exculpatory clause in a residential apartment lease, for example, could conceivably result in a severe, uncontemplated economic burden on tenants.

Several policy considerations, however, support the majority's position in the instant case. The principle of freedom of contract is fundamental to any decision involving the interpretation and effect to be given a contract and its various provisions.[141] It is sound public policy to enforce a contract as written by the parties themselves.[142] Although this principle lends support to the majority's decision, it does not dictate the outcome in the instant case. The principle of freedom of contract is limited by a number of factors such as unconscionability and unequal bargaining power.[143] Furthermore, the notion of freedom of contract will easily support the reasoning advanced by Justice Sugg's dissent. Another consideration pertinent to the instant holding is the paucity of legislative pronouncements concerning exculpatory clauses.[144]

An alternative policy consideration casts doubt on the majority's terse opinion. Exculpatory clauses may foster a want of care[145] and encourage landlords to overlook or ignore their contractual obligations. Therefore, in view of the resulting trend of courts and legislatures to invalidate exculpatory clauses,[146] the majority's decision was slightly out of step.

In conclusion, despite the fairer, more reasonable rule urged by the dissent, the harsh decision in *Smith* will prevail until the court again addresses the issue of the exculpatory clause and its validity in other contracts, or until it is overturned by a statutory provision declaring such clauses null and void as contrary to public policy.

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[141] *See* notes 70, 72 and accompanying text *supra.*

[142] *Id.*

[143] *See* notes 74, 75 and accompanying text *supra.*

[144] *See* note 78 and accompanying text *supra.*

[145] *See* note 71 *supra.*

[146] *See* notes 75 and 76 *supra.*

LABOR LAW—INTERNATIONAL UNIONS HAVE NO DUTY TO USE ALL REASONABLE MEANS TO END UNAUTHORIZED STRIKES UNLESS SO PROVIDED IN A COLLECTIVE BARGAINING AGREEMENT

Plaintiff, Carbon Fuel Company, brought an action under section 301 of the Taft-Hartley Act,[1] seeking injunctive relief and damages[2] against defendant unions[3] for breach of a collective bargaining agreement.[4] Three local unions of the UMW had engaged in unauthorized or "wildcat"[5] strikes at plaintiff's coal mines in violation of the arbitration provision of the agreement.[6] The good faith efforts of District 17, the regional subdivision of UMW, to persuade the miners to return to work were unsuccessful.[7] Finding the strikes to be violations of the collective bargaining agreements, the District Court for the Southern District of West Virginia instructed the jury that UMW and District 17 should be found liable if they did not use all reasonable means to prevent or terminate the strikes.[8] Verdicts were returned against all the defendant unions.[9] On appeal to the Court of Appeals for the Fourth Circuit, the UMW and District 17 contended that this instruction ignored the history of the collective bargaining agreement and misconstrued its terms.[10] The court of appeals vacated in part, but otherwise affirmed the judgments against the locals[11] and reversed the judgments against the International and District 17.[12] On writ of certiorari to the United States Supreme Court, *held,* affirmed.[13] A court may not infer a contractual duty on the part of an international or district union to use all reasonable means to prevent or terminate unauthorized strikes by its locals where the terms of the collective bargaining agreement impose no such duty, and where the evidence is insufficient to establish liability under common law principles of agency. *Carbon Fuel Co. v. United Mine Workers,* 444 U.S. 212 (1979).

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[1] 29 U.S.C. § 185(a) (1976) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . , or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[2] The original action sought injunctive relief and damages, but since the collective bargaining agreements expired prior to the trial of the case, the question of injunctive relief was not considered. Carbon Fuel Co. v. UMW, 444 U.S. 212, 214 n.2 (1979).

[3] At the district court level the suit was brought against Local Union Numbers 6572, 7626, and 2236, UMW District 17, and the International Union. Carbon Fuel Co. v. UMW, docket no. and date unavailable (S.D.W. Va.), *vacated in part, aff'd in part, rev'd in part,* 582 F.2d 1346, 1347 (4th Cir.), *aff'd,* 444 U.S. 212 (1979).

[4] Plaintiff and defendants were parties to the National Bituminous Coal Wage Agreements of 1968 and 1971. 444 U.S. at 213.

[5] The term "wildcat" strike has been applied to strikes in violation of collective bargaining agreements and/or to strikes not authorized by the union. Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act,* 52 CORNELL L.Q. 672, 673 n.6 (1967); Whitman, *Wildcat Strikes: The Unions' Narrowing Path to Rectitude?,* 50 IND. L.J. 472, 473 n.8 (1975). The court of appeals used the term "wildcat" in a manner synonymous with unauthorized. 582 F.2d at 1249. Other leading cases have also used the term in this sense. *See, e.g.,* NLRB v. Draper Corp., 145 F.2d 199, 205 (4th Cir. 1944) (wildcat strikers violating collective bargaining agreement without authorization from union not protected by National Labor Relations Act against discharge by employer).

[6] The collective bargaining agreement did not contain an explicit no-strike clause, but included a mandatory arbitration clause. Forty-eight work stoppages occurred between 1969 and 1973 at the various mines of Carbon Fuel, but 17 of the stoppages were "sympathy strikes". These sympathy strikes were not the result of any dispute between the union and the company, but were caused by reasons ranging from political protests to intra-union disputes. The court of appeals found that these strikes were not arbitrable and, therefore, did not breach the collective bargaining agreement. 582 F.2d at 1348-49.

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[7] Upon notification of a strike, a district representative arranged a meeting of the striking local and directed the members to return to work. Members were also advised that the International and District 17 could take disciplinary action against participants in the strikes. Since the strike did not end following this meeting, a second meeting was called. Most strikes lasted only one or two days and none lasted longer than six days. No disciplinary action was taken against the wildcatters because of the International's fear of aggravating the problem. 444 U.S. at 214 n.1.

[8] Carbon Fuel Co. v. UMW, docket no. and date unavailable (S.D.W. Va.), *vacated in part, aff'd in part, rev'd in part,* 582 F.2d 1346 (4th Cir.), *aff'd,* 444 U.S. 212, 214 (1979).

[9] 582 F.2d at 1348.

[10] *Id.* at 1350. A detailed discussion of the bargaining history was included in the Supreme Court opinion. The 1941 UMW agreement contained an explicit no-strike clause. To avoid potential lawsuits under § 301, the UMW negotiated the deletion of the clause in 1947. This new agreement limited coverage of the contract to all employees "able and willing to work," and the parties agreed to settle all disagreements through arbitration or collective bargaining. The 1950 contract dropped the "able and willing" provision and replaced it with a promise "to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout." In 1952 the union negotiated the deletion of the "best efforts through available disciplinary measures" clause because it did not want to restrict its freedom in dealing with unauthorized strikes. This provision was carried over in the 1968 and 1971 agreements. 444 U.S. at 219-21.

[11] The court vacated judgments based upon the sympathy strikes. *See* note 6 *supra.* It affirmed the judgment against the locals for the remaining 31 work stoppages based on a "mass action" theory. 582 F.2d at 1349-50.

[12] 582 F.2d at 1351.

[13] The issues involving sympathy strikes and liability of locals based on the "mass action" theory were not raised on appeal to the United States Supreme Court. 444 U.S. at 215 n.3.

The enactment of the Taft-Hartley Act[14] in 1947 gave parties to a collective bargaining agreement the right, under section 301 of the Act,[15] to sue in federal court for breach of contract.[16] It also provided the basis for development of a body of federal substantive law reflecting national labor policy.[17] However, since the policies advanced by federal labor laws often conflicted,[18] inconsistencies among courts in establishing standards of conduct necessary to impose liability on unions for wildcat strikes emerged.[19]

Under section 6 of the Norris-LaGuardia Act,[20] clear proof of actual authorization or subsequent ratification by union officials was necessary before a union could be held liable for the acts of its members.[21] Reacting to the burdens imposed on employers by this standard,[22]

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[14] Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-44, 151-68, 171-87 (1976)).

[15] *See* note 1 *supra.*

[16] Prior to the adoption of § 301, enforcement of collective bargaining agreements was difficult because of a union's unincorporated association status. 31 VAND. L. REV. 706, 708 n.21 (1978).

[17] In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court held that federal rather than state substantive law governed suits under § 301. After a detailed analysis of the legislative history of the Taft-Hartley Act, the Court concluded that the primary policy behind the Act was the promotion of collective bargaining as a method of securing industrial peace. Finding that the no-strike agreement was the quid pro quo for the employer's agreement to arbitrate, the Court held that the legislative policy could be advanced only if such collective bargaining agreements were vigorously enforced against both parties. *Id.* at 453 n.4, 456.

[18] *See* notes 38 through 45 and accompanying text *infra. See also* Summers, *Collective Agreements and the Law of Contracts,* 78 YALE L.J. 525, 556-60 (1969) (conflicts between parties' freedom to contract and national labor policy); Whitman, *supra* note 5, at 475-76 (courts guided only by policy of industrial peace ignore important countervailing considerations).

[19] *See* notes 46 through 52, 63 through 67 and accompanying text *infra. See also* Fishman & Brown, *Union Responsibility for Wildcat Strikes,* 21 WAYNE L. REV. 1017 (1975) (analysis of the standards of liability).

[20] 29 U.S.C. § 106 (1976).

[21] *Id.* provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after knowledge thereof.

[22] Section 301(e) of the Taft-Hartley Act was adopted to overrule United Bhd. of Carpenters v. United States, 330 U.S. 395, 403 (1947), which had upheld the standard of

Congress adopted the common law principles of agency in sections 301(b)[23] and (e)[24] of the Taft-Hartley Act as the basis for liability. Under this statute a union has clear responsibility for any strike which it authorizes, participates in, or ratifies in breach of its collective bargaining agreement.[25] Additionally, under section 301(e) a union incurs liability for the acts of its members, even in the absence of formal union approval, if the union member acts in his official capacity.[26] An international's or district's ambivalence toward an unauthorized strike may be sufficient to subject the union to an injunction or a claim for damages if it is determined that the union allowed the strike to continue in order to gain some benefit.[27]

The "mass action" theory, a judicially created extension of the statutory agency principle, may also be used to impose liability on the union.[28] The premise underlying this theory is that large groups of peo-

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§ 6 of the Norris-LaGuardia Act. 93 CONG. REC. 6858-59, *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1622 (1948).

[23] 29 U.S.C. § 185(b) (1976) provides:

> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

[24] 29 U.S.C. § 185(e) (1976) provides: "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

[25] *See, e.g.*, Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 238-39, 254 (1970) (injunction issued against union for strike violating no-strike clause); United Constr. Workers v. Haislip Baking Co., 223 F.2d 872, 876 (4th Cir.) (union liable if its agents participated in, ratified, or encouraged strike), *cert. denied*, 350 U.S. 847 (1955).

[26] *See, e.g.*, Mason-Rust v. Laborers' Local 42, 435 F.2d 939, 943 (8th Cir. 1970) (steward calling strike with implied authority); Lewis v. Benedict Coal Corp., 259 F.2d 346, 351-52 (6th Cir. 1958) (actions of field representative within his scope of authority despite lack of actual authorization to call strike), *aff'd by an equally divided Court*, 361 U.S. 459, 464 (1960); UMW v. Patton, 211 F.2d 742, 746 (4th Cir. 1954) (international and district unions responsible for actions of field representative within the scope and course of his employment).

[27] *See* Riverton Coal Co. v. UMW, 453 F.2d 1035, 1042 (6th Cir.) (only action taken by international was to send telegram; inaction a device to encourage strike and gain better bargaining position), *cert. denied*, 407 U.S. 915 (1972).

[28] The doctrine was first announced in United States v. UMW, 77 F. Supp. 563, 566-67 (D.D.C. 1948), *aff'd*, 177 F.2d 29, 35 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949), and has been adopted in numerous cases, *e.g.*, Eazor Express, Inc. v. International Bhd. of

ple do not act spontaneously and collectively without leadership,[29] so that inactivity on the part of a union during a wildcat strike indicates approval.[30] Since this theory imposes vicarious liability[31] on the union for the concerted acts of its members, some courts reject it,[32] while other courts generally restrict its application to local unions.[33]

The basis on which any action under section 301 rests is the collective bargaining agreement itself.[34] When terms of the agreement are disputed, a court's function is to interpret the terms according to the parties' intent.[35] A court may not, however, become a participant in the

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Teamsters, 520 F.2d 951, 963 (3d Cir. 1975) (mass action of union members regarded as union action), *cert. denied*, 424 U.S. 935 (1976); Wagner Elec. Corp. v. Local 1104, Int'l Union of Electrical Radio & Mach. Workers, 496 F.2d 954, 956 (8th Cir. 1974) (union responsible for mass action of members while union is functioning entity); Vulcan Material Co. v. United Steelworkers, 430 F.2d 446, 455 (5th Cir. 1970) (functioning union responsible for mass action of members), *cert. denied*, 401 U.S. 963 (1971); Adley Express Co. v. Highway Truck Drivers Local 107, 349 F. Supp. 436, 443-44 (E.D. Pa. 1972) (general proposition that unions are responsible for the mass actions of members); *see* Adley Express Co. v. Highway Truck Drivers Local 107, 365 F. Supp. 769, 778 (E.D. Pa. 1972) (deciding issue reserved in Adley Express Co., 349 F. Supp. 436, at 445-46) ("mass action" theory applies only to unauthorized strikes).

[29] Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 963 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976).

[30] 520 F.2d at 964. Misfeasance is described as the traditional agency principle of union liability, while nonfeasance is the "mass action" principle. Fishman & Brown, *supra* note 19, at 1025-26. Commentators disagree about the validity of this doctrine. *See* Whitman, *supra* note 5, at 487-89 (vicarious liability inconsistent with legislative intent of § 301). *But see* Fishman & Brown, *supra* note 19, at 1026-27 (vicarious liability merely extends agency to individual members and rests on national policy promoting arbitration).

[31] Apparently, the "mass action" theory does not impose strict liability for the conduct of the membership. The majority opinion in United States Steel Corp. v. UMW, 534 F.2d 1063, 1074 (3d Cir. 1976), held that a union may not be found responsible for the acts of its members regardless of its efforts to prevent the conduct, but could be held liable only for failure to use all reasonable efforts. *But see id.* at 1080 (Rosenn, J., concurring) ("mass action" theory presumes liability at time strike occurs and efforts thereafter cannot absolve union).

[32] *E.g.*, Southern Ohio Coal Co. v. UMW, 551 F.2d 695, 701 (6th Cir.) (union liable only for authorized or ratified actions of its officers or agents), *cert. denied*, 434 U.S. 876 (1977).

[33] *E.g.*, United States Steel Corp. v. UMW, 534 F.2d 1063, 1073-74 (3d Cir. 1976). The court reasoned that since liability is imposed on the basis of concerted activity of the membership, liability must be limited to the entity whose membership acts in concert. In most cases, that entity will be the local union. *Id.* at 1073-74.

[34] *See* Summers, *supra* note 18 (discussion of the applicability of ordinary contract law to collective bargaining agreements).

[35] *See* Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel Employees Union, 417 U.S. 249, 254-55, 264 (1974) (employer not required to arbitrate when express

bargaining process and must avoid the role of arbitrator.[36] Therefore, in interpreting contract provisions, a court should not infer duties unless they are firmly grounded in the express terms of the agreement.[37]

In *H.K. Porter Co. v. NLRB,*[38] the Supreme Court held that as a fundamental premise of national labor laws, collective bargaining should be free of governmental compulsion.[39] However, this policy of strict interpretation of contract provisions has occasionally been modified by other national labor policies.[40] For instance, in *Local 174, Teamsters v. Lucas Flour Co.,*[41] the Supreme Court interpreted a provision requiring grievance arbitration as a no-strike obligation.[42] The Court held that a contrary view would be at odds with the national policy underlying the adoption of section 301, encouraging arbitration of disputes.[43]

The legislative purpose of encouraging arbitration has been generally recognized,[44] but the extent to which courts may infer duties from

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provisions of contract reveal no such intent); NLRB v. Burns Security Servs., Inc., 406 U.S. 272, 287 (1972) (employer never consented to terms of collective bargaining agreement); H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (NLRB may not compel either party to agree to any substantive provisions of a collective bargaining agreement); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (party may be required to arbitrate only disputes that party has agreed to arbitrate).

[36] *E.g.,* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) (courts confined to determining whether claim governed by contract and should not weigh merits of grievance).

[37] *E.g.,* Kellogg Co. v. NLRB, 457 F.2d 519, 524-25 (6th Cir.) (quoting several cases indicating that collective bargaining agreements must be construed to reflect intent of parties as determined by clear and explicit terms of the contract), *cert. denied,* 409 U.S. 850 (1972).

[38] 397 U.S. 99 (1970).

[39] *Id.* at 108.

[40] In NLRB v. Burns Security Servs., Inc., 406 U.S. 272 (1972), the Court noted that while the prevention of industrial strife is an important federal labor policy, Congress did not subordinate totally the bargaining freedom of unions and employers. Bargaining freedom implies that neither party must make concessions as a result of government compulsion; furthermore, contract provisions may not be imposed against either party's will. *Id.* at 287.

In Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel Employees Union, 417 U.S. 249 (1974), the Court recognized that multiple statutory labor policies exist and maintained that a court may not disregard one policy to promote another policy that it views as more desirable. Therefore, the Court reasoned that it would be inconsistent to disregard basic policies governing unfair labor practices in a suit under § 301. *Id.* at 255-56.

[41] 369 U.S. 95 (1962).

[42] *Id.* at 105.

[43] *Id.*

[44] *See, e.g.,* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574,

terms of the agreement has been subject to dispute and has led to conflicting views among the circuits.[45] The Third Circuit in *Eazor Express, Inc. v. International Brotherhood of Teamsters*[46] held that a no-strike agreement in a collective bargaining contract necessarily implied an obligation on the part of the union to use "every reasonable means" to terminate unauthorized strikes.[47] The court reasoned that a no-strike agreement would be illusory[48] if a union were permitted to avoid responsibility for a prolonged strike by its members merely because the strike was not authorized or called by a union or one of its officers specifically empowered to do so.[49] Further, the court determined that certain duties and obligations must be inferred to fulfill the intent of the parties and to promote the federal policy of encouraging arbitration of disputes.[50] Since the union's appeals in *Eazor Express* were un-

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578, 583 (1960) (federal policy to promote stabilization of industry through arbitration; doubt resolved in favor of arbitration when arbitration clause unclear); Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 960 (3d Cir. 1975) (basic policy of national labor legislation to promote arbitration as alternative to economic warfare), *cert. denied,* 424 U.S. 935 (1976).

[45] *See generally* Fishman & Brown, *supra* note 19 (discussion of duties of union in wildcat strikes as construed by various circuit courts); Whitman, *supra* note 5.

[46] 520 F.2d 951 (3d Cir. 1975), *cert. denied,* 424 U.S. 935 (1976). This suit was against the International and two local unions. 520 F.2d at 954-55. For a discussion of this case, see Fishman & Brown, *supra* note 19, at 1031-41; Whitman, *supra* note 5; 89 HARV. L. REV. 601 (1976); 26 VAND. L. REV. 1331 (1973); 19 VILL. L. REV. 665 (1974).

[47] 520 F.2d at 959. Also at issue in this case was whether the International was a party to the agreements. The agreements were signed by the National Union Committee, and the International argued that the Committee was acting as attorney in fact for local unions. However, the court held that, notwithstanding the formalities, the International and the National Committee were intimately associated, and that the International became a party by approving the contract. *Id.* at 958-59.

[48] *Id.* at 960. The court maintained that the primary reason employers agree to arbitrate grievances, sacrificing their unreviewable discretion, is to secure uninterrupted operations during the term of the collective bargaining agreement. Therefore, the courts should favor a construction which makes the mutual promises binding. *Id.*

[49] *Id.* The court relied not only on the no-strike clause to establish liability, but also maintained that either the "mass action" theory or the common law agency principles made available through §§ 301(b) and 301(e) would impose liability on the International. In instances where, as here, the job stewards and committeemen instigated, participated in, or actively encouraged continuation of the unauthorized strike, subsequent conduct by the union inconsistent with repudiation might constitute ratification of the unauthorized acts. The court maintained that liability could be imposed regardless of the union's limitations upon the authority of the stewards and committeemen. *Id.* at 963-64.

[50] The court recognized that the judiciary may not "remake" the contract, but may declare implied obligations when necessary to fulfill the purposes of the parties, if there is a sufficient basis in the express provisions of the agreement. *Id.* at 960. Relying on Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962), the court held that implied

successful,[51] the court held that the union should have imposed disciplinary measures against the wildcat strikers.[52]

The Third Circuit in *United States Steel Corp. v. UMW,*[53] reasoning that a binding arbitration clause was equally compelling on a union,[54] refused to restrict the duty to use all reasonable efforts only to those agreements containing specific no-strike clauses.[55] The contract in this case also included a provision in which the union agreed to "maintain the integrity" of the contract.[56] This provision, the court concluded, necessarily embraced the obligation to use all reasonable ef-

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obligations may be declared on the basis of the national policies promoting arbitration of disputes. 520 F.2d at 960, 963. *Cf.* Meat Cutters Local 195 v. Cross Bros. Meat Packers, Inc., 518 F.2d 1113, 1117 (3d Cir. 1975) (in action to vacate arbitrator's award of damages against union court found strong policy favoring arbitration of disputes). In *Eazor Express* one of the two supplementary agreements provided that the union agree to employ "every reasonable means" to induce employees to return to work. 520 F.2d at 962.

[51] The sole means used by the union to persuade strikers to return to work were written and spoken words. In light of the violent situation, the court found that the International should have resorted to discipline or removal of job stewards and committeemen, suspension or firing of striking union members, placement of the local union in temporary trusteeship, or secret voting by union members. 520 F.2d at 964. The possible negative effects on the unions themselves, the court held, were not relevant. *Id.* at 967.

[52] *Id.* at 967; *accord,* Republic Steel Corp. v. UMW, 470 F.2d 467, 479 (3d Cir. 1978) (advocating sanctions by union against members). Concluding that disciplinary measures should have been imposed, the court in *Eazor Express* was concerned about the practical problems encountered by the employer faced with a wildcat strike. Because union members may not be held individually liable for damages in wildcat strikes under Sinclair Oil Corp. v. Oil, Chem. & Atomic Workers Int'l Union, 452 F.2d 49, 50 (7th Cir. 1971), the employer would have no remedy. 520 F.2d at 967. *But cf.* DuQuoin Packing Co. v. Local P-156, Amalgamated Meat Cutters, 321 F. Supp. 1230, 1233 (E.D. Ill. 1971) (individual members acting individually liable). In Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 245-49 (1962) the Supreme Court held that if a union is found liable for damages, individual members cannot be sued. The Court left open the question of whether individual members might be found liable in cases in which the union is not liable. *See generally* Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits, and Injunctions,* 24 LABOR L.J. 592, 611-15 (1973) (availability of injunction or damages against wildcat strikers). The court in *Eazor Express* also reasoned that the union was logically the responsible party since it had numerous alternatives available to influence the wildcatters. 520 F.2d at 964-65.

[53] 534 F.2d 1063 (3d Cir. 1976).

[54] *Id.* at 1073.

[55] *Id.* The court also held that *Eazor Express* could not be distinguished from United Constr. Workers v. Haislip Baking Co., 223 F.2d 872, 876 (4th Cir.), *cert. denied,* 350 U.S. 847 (1955) on this basis. 534 F.2d at 1073. *See* notes 65 through 68 and accompanying text *infra.*

[56] The 1974 Bituminous Coal Wage Agreement contained a provision in which the parties agreed to maintain the integrity of the contract and to submit disputes to arbitration. 534 F.2d at 1073.

forts to end the strikes.[57]

Other decisions have announced a duty on the part of a union to use its best efforts,[58] but not the disciplinary measures suggested in *Eazor Express.*[59] For instance, in *Penn Packing Co. v. Meat Cutters Local 195,*[60] the Third Circuit held that urging a return to work and offering to pay the salaries of discharged stewards, pending arbitration, constituted sufficient action to discharge the union's liability.[61] The court later indicated that the standard of conduct may differ depending on whether the employer is seeking an injunction or damages.[62] Similarly, the Eighth Circuit, in *Wagner Electric Corp. v. Local 1104,*[63] required that the union use its best efforts to terminate an unauthorized strike. In that case the union's press release denying authorization was held insufficient to remove liability for a wildcat strike.[64]

Conversely, the Fourth Circuit has been unwilling to infer a duty to use all reasonable means to end unauthorized strikes and has limited liability to the common law agency principles of section 301. In *United Construction Workers v. Haislip Baking Co.,*[65] a wildcat strike arose out of a grievance the court found to be of a purely local nature.[66] Since the International had nothing to gain from the strike, the court determined that there was no basis for inferring endorsement by its representatives from their failure to stop the strike.[67] Nothing in the terms of the contract made the International liable for unauthorized strikes or required it to take any action with regard to them.[68] The question, the court held, was not whether the International did everything possible to terminate the strike, but whether it adopted, encouraged, or prolonged the strike.[69] Additionally, the court indicated that although the local union was not sued, the facts indicated that liability could be placed on the local union under the agency theory.[70] However, the mandatory arbitration provision was an insufficient basis from which to infer a duty on the part of the International to use all reasonable means.[71]

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[57] *Id.*

[58] Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446, 457 (5th Cir. 1970) (International's representative was direct participant in strike; although he urged return to work he took no action reasonably expected to end strike), *cert. denied,* 401 U.S. 963 (1971); Adley Express Co. v. Highway Truck Drivers Local 107, 349 F. Supp. 436, 444 (E.D. Pa. 1972) (no-strike provision in contract; union has burden of showing substantial and sincere efforts to end strikes).

[59] *See* notes 58 *supra,* 60 through 64 and accompanying text *infra.* For a discussion of the *Eazor Express* sanctions, see note 52 and accompanying text *supra.*

[60] 497 F.2d 888 (3d Cir. 1974).

[61] *Id.* at 891. The court was unwilling to impose strict liability on the union for unauthorized strikes absent explicit language in the agreement to that effect. Further, the court maintained that this case could be distinguished from *Eazor Express,* Wagner Elec. Corp. v. Local 1104, Int'l Union of Electrical, Radio and Mach. Workers, 496 F.2d 954 (8th Cir. 1974), and Adley Express Co. v. Highway Truck Drivers Local 107, 349 F. Supp. 436 (E.D. Pa. 1972), because the union in this case had used every means available to end the strike. The court did not require disciplinary measures. 497 F.2d at 891.

[62] United States Steel Corp. v. UMW, 534 F.2d 1063, 1074 (3d Cir. 1976).

[63] 496 F.2d 954 (8th Cir. 1974) (mass action theory basis of liability).

[64] *Id.* at 956.

[65] 223 F.2d 872 (4th Cir.), *cert. denied,* 350 U.S. 847 (1955).

[66] 223 F.2d at 877.

[67] *Id.* at 878-79.

A similar rationale was adopted by the Sixth Circuit in *Southern Ohio Coal Co. v. UMW*,[72] which held that a union was responsible only for the authorized or ratified actions of its officers or agents.[73] However, the court was also concerned about judicial intervention into the collective bargaining process through inference of terms the parties never intended.[74] In *Southern Ohio Coal*, union members refused to cross picketlines established by nonunion pickets engaged in an illegal strike at another mine.[75] Although the collective bargaining agreement included a broad arbitration clause, the court reasoned that the employees' right to honor another's picketline could be waived only by explicit language.[76] While recognizing the problems imposed on the employer by such a rule,[77] the court maintained that the alternative was to hold the union to a bargain it did not make.[78]

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[68] The agreement did not contain a no-strike clause, but did contain a provision for the arbitration of grievances. *Id.* at 876.

[69] *Id.* at 877-78; *accord*, Central Appalachian Coal Co. v. UMW, 376 F. Supp. 914, 923 (S.D.W. Va. 1974) (no general duty to take affirmative action to prevent or terminate unauthorized activities by locals or members) (citing *Haislip*).

[70] "The local union was liable because the strike, although informally commenced, unquestionably had the approval of the local union . . . ." 223 F.2d at 877. However, in Republic Steel Corp. v. UMW, 570 F.2d 467 (3d Cir. 1978), the court refused to impose liability on a local for the refusal of union members to cross stranger picketlines because there was no evidence that the local had retained any control over its members' actions. Instead, the International Union was held liable because the interaction between the local and the stranger pickets was a result of their common bond of membership in the International. Under such circumstances, the International had an affirmative duty to take steps to stop unlawful activity. *Id.* at 479.

[71] 223 F.2d at 877.

[72] 551 F.2d 695 (6th Cir.), *cert. denied*, 434 U.S. 876 (1977).

[73] 551 F.2d at 701.

[74] *Id.* at 705. The court noted with approval that the Supreme Court, in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 410 (1976), had admonished federal courts against usurping the role of arbitrators and interfering with parties' private contractual relationships. 551 F.2d at 702. *See* notes 35 through 39 *supra*.

[75] The court concluded that the locals' refusal to cross the stranger picketlines was not ratification or active participation. 551 F.2d at 699-700. However, the primary question addressed by the court was whether the sympathy strike was a breach of the arbitration agreement. *Id.* at 705. *See generally* Lowden & Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of Buffalo Forge*, 45 GEO. WASH. L. REV. 633 (1977) (analysis of sympathy strikes and union

The Seventh Circuit also emphasized the intent of the parties in *Old Ben Coal Corp. v. Local No. 1487, UMW.*[79] Interpreting the terms of the National Bituminous Coal Wage Agreement of 1968, the court held that the mandatory arbitration provision was pro tanto an obligation not to strike. However, the court determined that the union had preserved the right to strike with respect to all disputes not within the provision, and that the union was protected from liability for wildcat strikes by the specific language of the agreement.[80]

In the instant case, the Court reasoned that since the legislative history of section 301 revealed an intent to limit the legal responsibility of an international for the unauthorized acts of its locals[81] by incorporating the common law agency test[82] in sections 301(b) and 301(e),[83] it would be anomalous to infer a duty to use all reasonable means to

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liability).

[76] Relying on Justice Black's opinion in NLRB v. Rockaway News Co., 345 U.S. 71, 81 (1953) (Black J., dissenting), the court maintained that although the Taft-Hartley Act was designed to restrict the activities of unions, it did not deprive unions of the right to honor picketlines. 551 F.2d at 705.

[77] The burden on the employer is the primary criticism of this view. *See generally* Fishman & Brown, *supra* note 19, at 1017-24 (problems of employer proof and business jeopardy); Spelfogel, *supra* note 52, at 599-600. *But see* Gould, *supra* note 5, at 700-04 (reasons for limited union liability); Whitman, *supra* note 5, at 480-87 (limitations on unions' power to discipline). The court also noted that if the stranger pickets were illegal, the employer could resort to legal remedies against them. 551 F.2d at 705.

[78] 551 F.2d at 700, 705.

[79] 457 F.2d 162 (7th Cir. 1972).

[80] *Id.* at 164-65. The court based its conclusion on Lewis v. Benedict Coal Corp., 259 F.2d 346, 351 (6th Cir. 1958), *aff'd by an equally divided Court,* 361 U.S. 459 (1960).

[81] Carbon Fuel Co. v. UMW, 444 U.S. 212, 217 (1979). However, the Court noted that an international union is responsible under § 301 for any strike it authorizes in violation of its contract. *Id.* at 216 n.5.

[82] The Court explained that to hold an international union liable under the common law agency test and the common law doctrine of respondeat superior required a clear showing that "what was done was done by their agents in accordance with their fundamental agreement of association." *Id.* at 217 (quoting Coronado Coal Co. v. UMW, 268 U.S. 295, 304 (1925) (Taft, C.J.)).

[83] The Court quoted Sen. Taft's explanation of § 301(e) during Congressional debates, 93 CONG. REC. 4022 (1947), emphasizing the requirement of legal proof of agency for union liability. 444 U.S. at 217.

control the locals' action.[84] Furthermore, because Congress' policy in favor of arbitration did not override this statutory limitation on union liability,[85] the arbitration provision of the collective bargaining agreement could not be held to imply any further duty.[86] Additionally, the Court held that the specific contract provision that obligated the UMW to "maintain the integrity of the contract"[87] did not impose an additional duty on the UMW to stop the strike.[88] In reaching this conclusion, the Court found that the bargaining history of the agreement between the UMW and Carbon Fuel Company revealed that the parties had decided not to obligate the International to take disciplinary or other action to force unauthorized strikers back to work.[89] The Court reasoned that since one significant purpose of the Taft-Hartley Act was to promote collective bargaining without government compulsion,[90] the agreement reached by the parties controlled their relationship and duties, and the courts could not alter the terms.[91] Thus, since no duty to use all reasonable efforts was implied in law or in the "integrity" clause of the contract,[92] and since Carbon Fuel Company failed to establish agency,[93] the International and its regional subdivision could not be held liable for the unauthorized strikes of its locals.[94]

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[84] 444 U.S. at 217-18.

[85] Carbon Fuel argued that § 301 was established to promote arbitration and discourage strikes in breach of contract. The Court recognized this purpose, but noted that Congress gave special attention to limitations on the liability of unions for strikes they did not authorize, participate in, or ratify. *Id.* at 216.

[86] *Id.* at 217-18.

[87] Carbon Fuel maintained that this provision was meaningless unless a union were required to use its best efforts to prevent unauthorized strikes. *Id.* at 219.

[88] *Id.* at 222.

[89] *Id.* at 221. *See* note 10 *supra.*

[90] The Court noted that Congress added § 8(d) of the Taft-Hartley Act to define collective bargaining in a manner that did not compel either party to agree to a proposal or require either party to make a concession. 444 U.S. at 219. The section provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Labor-Management Relations (Taft-Hartley) Act § 8(d), 29 U.S.C. § 158(d) (1976).

[91] 444 U.S. at 219.

[92] *Id.* at 216.

[93] The locals lacked authority to strike without approval of the International under the UMW constitution, and there was no evidence that the International or District had instigated, supported, ratified, or encouraged the strike. *Id.* at 218.

The instant case restricts the liability of an international or district union for wildcat strikes by its locals to the specific terms of the collective bargaining agreement, unless proof of agency can be established. However, this type of restriction on union liability neglects the central exchange in any collective bargaining agreement.[95] The primary object sought by the employer is a period of uninterrupted business operations, and in exchange he sacrifices his unreviewable discretion in employment policies.[96] If the international is not obligated to take affirmative action to prevent or terminate work stoppages that breach the collective bargaining agreement, the employer must accept the full burden of ending wildcat strikes by the local union.[97]

Employers maintain that this result is unfair: first, because it increases the likelihood of frequent or longer strikes by wildcatters; and second because the international possesses the most effective means of terminating unauthorized strikes through intra-union disciplinary measures.[98] While employers have alternative methods of discouraging wildcat strikes, they maintain that these measures are generally inadequate to compensate for their losses.[99] For instance, the employer may discharge the striking employees.[100] However, he is then faced with the time and expense of hiring and training replacements, as well as the possibility that the strike may be aggravated as a result of the discharges. In addition, strikers often make full reinstatement a condition of strike termination.[101] An employer may also be able to sue strikers individually for damages, but it is unlikely that individual suits will compensate his losses.[102] Injunctive relief is another alternative to damages; however, it is often difficult to enforce against wildcat strikers. If wildcatters ignore the injunction, fines are equally difficult to collect, and jail sentences may generate hostility that prolongs the strike.[103]

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[94] *Id.* at 215.

[95] *See* Fishman & Brown, *supra* note 19, at 1017-18 (employer's quid pro quo for concession to grievance-arbitration is "no strike" commitment).

[96] *Id.*

[97] *Id.* at 1020-22. *See* 26 VAND. L. REV. 1331, 1335 (1973) (imposing duty on union to use all reasonable means will encourage employers to enter collective bargaining agreements).

[98] Fishman & Brown, *supra* note 19, at 1033-40 (discussion of extent of unions' duty to discourage wildcat strikes); 31 VAND. L. REV. 706, 715 (1978) (international union liable for unauthorized sympathy strike). It has also been argued that international unions will not take action against wildcat strikers unless threatened with damage suits. Fishman & Brown, *supra* note 19, at 1022.

[99] *See generally* Fishman & Brown, *supra* note 19, at 1021-22 (possibility that selective discharging or disciplinary action will "boomerang" on the employer); Note, *Reaction to the Wildcat Strike—The Employer's Dilemma,* 20 CASE W. RES. L. REV. 423, 436-37 (1969) (monetary damages inadequate compensation).

[100] Since wildcat strikes are not protected activities under 29 U.S.C. § 157 (1976), discharging of strikers is not an unfair labor practice. 89 HARV. L. REV. 601, 603-04 n.15 (1976).

[101] Fishman & Brown, *supra* note 19, at 1022.

Since the instant case does not alter the liability of local unions for wildcat strikes, the employer may still seek damages from the local. If a local calls a strike without authority from its international, it is clearly responsible for the breach of contract and the consequent damages under section 301.[104] Although the Supreme Court did not address the issue of local union responsibility for the unauthorized acts of its members, the Court of Appeals for the Fourth Circuit held the local unions liable under the "mass action" theory.[105] It is unclear from case law whether a local union is required to take disciplinary action to end a wildcat strike.[106] The cases generally hold that a local may not be held strictly liable for unauthorized strikes, but must take some affirmative action inconsistent with authorization to be relieved of liability.[107] Thus the employer may look to the local union for assistance in terminating an unauthorized strike and for damages if the local does not attempt to stop the strike.

There are several practical reasons favoring the Court's restriction in the instant case on the liability of the International and district unions. Although the union is the bargaining agent for all employees within a business or unit, it may not have the support of all employees.[108] There may be within the bargaining unit hostile factions that would like to have the incumbent exposed to liability. Had the Court imposed the "all reasonable means" standard on the International, the union's flexibility in determining the most productive route for ending a strike would have been substantially narrowed. This is especially true when a court determines that disciplinary action should have been taken against strikers. Union officials who evaluate the repercussions of each choice should be allowed to decide whether disciplinary sanctions will help bring the strike to an end or whether they will be counterproductive.[109] Furthermore, severe sanctions by a union may exacerbate factionalism, thus hampering the union's ability to terminate the strike.[110] There are also statutory restrictions on a union's disciplining of its members.[111] For instance, the Landrum-Griffin Act,[112] designed primarily to protect the rights of individual members, restricts a union's disciplinary authority.[113] Section 101(a)(5) of the Act requires written notice, preparation time, and a hearing for wildcat strikers subject to disciplinary measures by a union.[114]

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[102] *See* note 52 *supra;* Gould, *supra* note 5, at 702-03 (employees would not have sufficient resources to compensate for loss of business).

[103] 89 HARV. L. REV. at 604.

[104] *See* notes 23 through 25 and accompanying text *supra.*

[105] *See* notes 11 and 33 *supra.*

[106] *See* notes 28 through 33 and accompanying text *supra.*

[107] Many of the arguments against requiring disciplinary measures for the international apply to the local union as well. *See* notes 11 through 15 and accompanying text *supra.*

[108] Gould, *supra* note 5, at 701-02.

Appellate court decisions that have found an implicit duty in collective bargaining agreements on the part of the international to use all reasonable means to terminate unauthorized strikes were characterized by a predominant concern for encouraging arbitration and preventing strikes.[115] In the instant case the Supreme Court recognized that the primary purpose of the Taft-Hartley Act was to promote arbitration. However, the Court also recognized the importance of multiple federal policies promoted in labor legislation and the statutory restrictions embodied in section 301.[116] The holding was consistent with prior cases restricting the authority of the courts to intervene in the collective bargaining process.[117]

This narrow interpretation of collective bargaining contracts promotes free bargaining between the parties and protects each party from the imposition of unacceptable terms. If employers want an international union and its regional subdivisions to exhaust every reasonable means to terminate unauthorized strikes, they must bargain for that condition. Although proof of authorization may be difficult, the decision in the instant case does not give the international the freedom to remain idle and publicly denounce the strike while reaping any consequent benefits.[118] Common law agency principles govern, and courts must consider the facts of each case to determine whether the union encouraged, authorized, ratified, or participated in the strike. Similarly, when assessing the intent of the parties with regard to disputed terms in the contract, courts must examine the bargaining history to determine the extent of responsibility. Thus, the Court's analysis appropriately emphasizes the parties' contractual obligations since each party bargains for the terms of the agreement which establish the relationship and responsibilities.

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[109] *Id.* at 702; 89 HARV. L. REV. at 608.

[110] Whitman, *supra* note 5, at 481-82; 89 HARV. L. REV. at 608.

[111] *See generally* Whitman, *supra* note 5, at 480-87; 89 HARV. L. REV. at 608-09 (discussion of sanctions prohibited under the Landrum-Griffin Act).

[112] Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401-531 (1976).

[113] *See* Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act,* 82 HARV. L. REV. 727 (1969). *But see* Fishman & Brown, *supra* note 19, at 1037-38 (time is only obstacle to union's use of disciplinary proceedings; Act does not prohibit summary removal of recalcitrant officers; parent union has power of trusteeship).

[114] 29 U.S.C. § 411(a)(5) (1976). Application of other provisions of the Act to wildcat strikers is unclear. For example, summary discipline of union officers is generally permitted, unless it is characterized as a reprisal for opposing union leadership. *See* Grand Lodge of the Int'l Ass'n of Machinists v. King, 335 F.2d 340, 344 (9th Cir.) (Landrum-Griffin Act prohibits removal of appointed officers who support the "wrong" candidate), *cert. denied,* 379 U.S. 920 (1964). The union would have to defend its actions as reasonably designed to prevent interference with the union's contractual obligations. Whitman, *supra* note 5, at 482-85; 89 HARV. L. REV. 601, 609 (1976).

[115] *See* notes 46 through 64 and accompanying text *supra.*

[116] *See* notes 81 through 89 and accompanying text *supra.*

[117] *See* notes 37 through 40 and accompanying text *supra.*

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[118] *See* notes 26, 27 and accompanying text *supra*.

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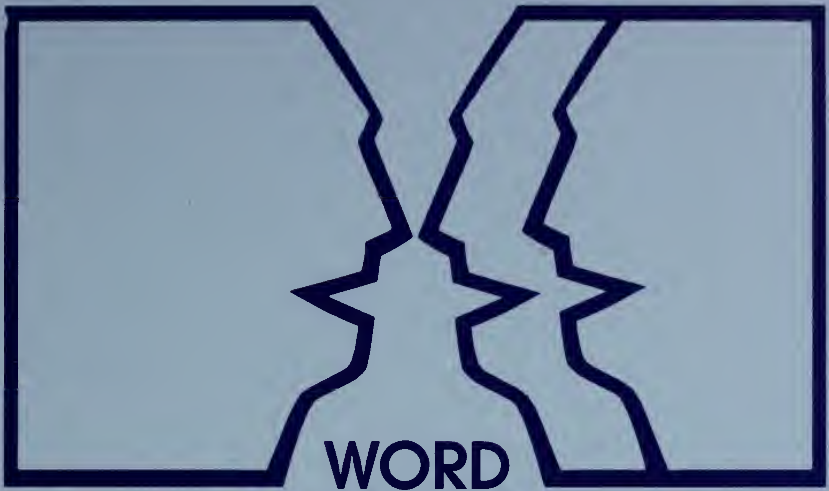

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